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FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**

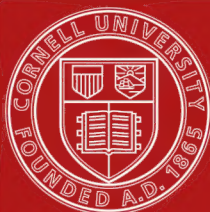
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A TREATISE ON THE LAW  
OF  
BENEFIT SOCIETIES  
AND INCIDENTALLY OF  
LIFE INSURANCE.

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BY *Amptden*  
FREDERICK H. BACON,  
*Of the St. Louis Bar.*

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ST. LOUIS:  
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**THIS VOLUME  
IS AFFECTIONATELY INSCRIBED  
TO MY BROTHER,  
COL. EDWARD BACON,  
OF NILES, MICHIGAN;**

**WHOSE INTEGRITY, CLEAR INTELLECT AND STUDIOUS HABITS HAVE  
MADE HIM A SUCCESSFUL LAWYER. I SPENT A HAPPY PERIOD  
OF MY LIFE READING LAW IN HIS OFFICE, AND THE  
MEMORY OF HIS EXAMPLE AND PRECEPTS WILL  
EVER BE CHERISHED.**

**F. H. B.**



## PREFACE.

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The secret benevolent and beneficiary orders, or beneficiary societies, which are both social clubs and life insurance companies, have multiplied amazingly during the last twenty years. Branches of these organizations are now found in nearly every village in the land and in the larger cities the lodges are numbered by scores and even hundreds. They have characteristics in common with ordinary clubs and the familiar fraternities, the Masons and Odd-fellows.

The litigation connected with these societies is novel and important. It embraces two classes of cases; the first involving the discipline of members and their personal liability for the community debts; the second includes the still more important questions relating to the rights of beneficiaries, the decision of which often requires an application of the principles of the law of life insurance. The numerous cases, decided during the last ten years, by the courts of last resort of the several States and the Federal courts, are not collected or discussed in any legal text-book, consequently they are unfamiliar to most lawyers, who do not realize their extent and value.

Cases that have arisen in my own practice have convinced me of the need of a treatise on this subject, one in which the rights and liabilities of members of the beneficiary orders and of their beneficiaries should be considered in close connection with the law of life insurance proper. This need I have tried to supply. The work covers the entire subject of life insurance and includes all cases decided up to date.



The extent to which I have succeeded must be determined by the profession. Although I make public the results of my labors with diffidence, I am content to do so without apology other than this brief explanation. My work must speak for itself — its value must be measured by the merit its use may develop, its faults could not be lessened or excused by anything I here might say.

I have generally cited the cases, in addition to a reference to the regular reports, by the volume and page of the American Decisions, American Reports and the National and Co-operative Systems of Reporters, if re-reported. I have not, however, given all of these references each time the case is referred to. The full citations may be found by consulting the table of cases which precedes the text.

I wish to here acknowledge my obligations to P. Wm. Provenchere, Esq., of the St. Louis bar, who carefully read the work in manuscript and materially aided me with valuable suggestions. Also to Hon. John Frizzell, of the Nashville, Tenn., bar, who has read the proofs and has given me the benefit of his ripe experience.

FREDERICK H. BACON.

ST. LOUIS, October, 1888.

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# THE LAW OF BENEFIT SOCIETIES.

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## CHAPTER I.

### INTRODUCTORY.

#### DEFINITION, HISTORY AND EXTENT OF BENEFIT SOCIETIES; ORIGIN AND GROWTH OF LIFE INSURANCE.

- § 1. Nature of Benefit Societies.
2. They are Social Clubs.
  3. They are Business Organizations.
  4. Kindred Societies.
  5. Ancient Origin of Benefit Societies.
  6. History of Guilds.
  7. Decay of Guilds: their Successors.
  8. History of Clubs.
  9. Analogies between Ancient and Modern Clubs.
  10. The English Friendly Societies.
  11. The American Beneficiary Orders.
  12. The Secret Fraternities.
  13. Allied Organizations.
  14. Characteristics in common.
  15. Definitions of Life Insurance.
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  18. Various classes of Life Insurance.
  19. Assurance and Insurance.
  20. History of Life Insurance.
  21. An early English Case.
  - 21a. First American Case.
  22. Method of Conducting Business.
  23. Analogies between Benefit Societies and Life Insurance Companies.
  24. Early Beneficiary Life Insurance Cases in the United States.
  25. Definition of Terms used in Insurance.

§ 1. Nature of Benefit Societies. — The modern mutual benevolent life insurance organizations, generally called

benefit societies, have come prominently into public view only during the last twenty-five years. From this fact we are not to conclude that they are wholly a modern institution; on the contrary, they are the composite results of the experience of generations and centuries, they represent what is best and most useful of the multitude of social associations of all kinds that have existed in all times in every land. They seem to have sprung suddenly into the strength of mature life, yet, in fact, they have been developing for hundreds of years.

Benefit societies have a dual nature and in determining their responsibilities, powers and rights and those of their members this fact must never be lost sight of. Very different conclusions will be reached as we consider one class of characteristics or the other.<sup>1</sup>

§ 2. **They are Social Clubs.**—They are, in the first place, social organizations, or clubs of congenial associates, bound together by secret obligations, mystic signs and fraternal pledges. They have generally initiatory rites and ceremonials and a more or less elaborate ritual; their members are pledged to fraternity and mutual assistance in times of distress and need. Usually the organization is made up of local lodges, or societies, with higher, grand or supreme lodges, the latter being fountains of law for the whole association and the corporate entities of the confederations.<sup>2</sup>

Considered as clubs, questions may arise as to their power over their members, or, if unincorporated, the personal liability of the latter to creditors of the association. In settling these external and internal controversies the principles of the law of agency apply; <sup>3</sup> or *mandamus* is resorted

<sup>1</sup> *Mulroy v Knights of Honor*, 28 Mo. App. 463.

<sup>2</sup> See *post*, § 11.

<sup>3</sup> *Post*, §§ 35, 36.

to for the restoration of members wrongfully expelled,<sup>1</sup> or courts of equity interfere to wind up the societies and distribute their assets, or exercise other supervisory powers.<sup>2</sup>

**§ 3. They are Business Organizations.** — They are also business corporations and derive their name of benefit societies from this fact. All of them collect, monthly or oftener, from their members certain contributions or assessments, in consideration of which they agree to pay to the member, if sick or disabled, an agreed amount, or upon his death to pay to his designated beneficiary a specified sum, or an amount equal to the aggregate of one assessment not exceeding a certain sum. In most cases these beneficiaries must be of the family of the deceased or those dependent upon him in some way for support. In token of these rights certificates of membership are generally issued.

These societies are the poor man's life insurance companies, for they furnish to those of moderate incomes a cheap and simple substitute for life insurance. The assessments are seldom in excess of one or two dollars, are called as occasion requires, but as a rule every month, and the benefit paid is from five hundred to five thousand dollars.

Litigation often arises over these contracts, and, as we shall see,<sup>3</sup> involves the application of the principles of the law of life insurance. This litigation is increasing in volume and often presents complicated and interesting questions of law.

**§ 4. Kindred Societies.** — There are also organizations which are benefit societies only in name, but are similar to them in having their insurance feature. Such are the associations collateral to the great secret societies, the Free-

<sup>1</sup> *Post*, § 442.

<sup>2</sup> *Post*, §§ 59, 108, 442.

<sup>3</sup> *Post*, § 51.

masons and Odd-fellows. While their membership is drawn from the orders, whose names they respectively bear, the insurance feature is the one object of the organizations and they are practically mutual life insurance companies, having a different plan from the older regular life insurance companies. Of these societies we shall speak later.<sup>1</sup>

§ 5. **Ancient Origin of Benefit Societies.** — Benefit societies, as now known, are the legitimate successors of the clubs and guilds that have existed from ancient times in all countries. By the processes of increasing and extending civilization with its new needs and greater knowledge, each succeeding generation has improved upon the customs and resources of its predecessors, and so, through the centuries, we can trace the gregarious habit and co-operative idea, until from the numerous sodalities and secret societies of remote periods it leads to the formation of the social and industrial associations of the present century,—to the friendly societies of Great Britain and the co-operative life insurance and fraternal bodies of the last quarter century in this country.

§ 6. **History of Guilds.** — Men are social beings and their instincts and needs have, from the earliest times, caused them to unite with each other for the pleasures of mutual enjoyment or for the attainment of a common purpose. They have sought the power of numbers for resisting oppression, or mutual assistance in times of need, and again, their affinities for those having similar occupations and interests have led to the formation of societies or guilds.

The Eranoi of Greece and the Collegia of Rome were the earliest of these associations and they continued in various forms through the decline of the empire, reviving and gaining new vigor as the guilds of the middle ages. “The essential principle of the guild is the banding together for

<sup>1</sup> *Post*, § 13.

mutual help, mutual enjoyment and mutual encouragement in good endeavor." These societies were numerous in the palmy days of Rome, when most of them were trade corporations devoted to the interests of their crafts, while some were formed for good fellowship, to promote religion and to provide for burial. The highest persons were often glad to belong to them and many were exceedingly rich and influential. The plan of organization was simple; they chose their own officers, made rules for self government, collected contributions for a common fund and met and feasted together at stated times.

In the middle ages social guilds sprang up all over Europe, but chiefly in England and Germany and one or more was found in every village. Their objects, says an authority,<sup>1</sup> included "not only devotions and orisons, but also every exercise of Christian charity, and, therefore, above all things, mutual assistance of the guild brothers in every exigency — especially in old age, in sickness, and in cases of impoverishment, — if not brought on by their own folly, — and of wrongful imprisonment, in losses by fire, water or shipwreck, aid by loans, provision of work, and lastly the burial of the dead. It included further the assistance of the poor and sick, and the visitation and comfort of prisoners not belonging to the guild."

In England many of these guilds numbered among their members men and women of all ranks and were rich and powerful, so that kings and princes did not disdain to become guild brethren. Henry IV. and Henry VI. were members of one organization and Henry VIII. of another. The work done by these societies was humane and charitable; they furthered public and benevolent objects and founded schools and colleges; they assisted in the construction of municipal works and were a valued adjunct in the proceedings of the important cities. Their social features

<sup>1</sup> Brentano; "History and Development of Guilds."

were popular and highly appreciated in their communities. When the Reformation came the guilds in most Protestant countries were abolished under pretense of their being superstitious foundations.

In contradistinction from the social were the trade guilds, or merchant-guilds and craft-guilds, which attracted more attention because of their wealth and importance. Returns of all guilds were made into chancery in 1389, and the borough records of England and Scotland show the influence and power of the trade associations. "The guild-merchant arose in this way: the same men who, in the growth of towns became citizens by reason of possessing town lands, frequently were also traders; the uncertain state of society in early times naturally caused them to unite for protection of their trade interests in a *gilda mercatoria*, which made internal laws akin to those of other guilds; the success of these private interests enlarged their importance; and when the towns and boroughs obtained confirmation of their municipal life by charter, they took care to have it included that the men of the place should also have their guild-merchant. Thus these guilds obtained the recognition of the State; in their origin they had been as other guilds, partaking especially of the character of peace-guilds, but now the citizens and the guild became identical, and what was guild-law often became the law of the town. In great cities, such as London and Florence, we do not hear of merchant-guilds; <sup>1</sup> there the separate occupations or crafts early asserted their associating power and independence, and the craft-guilds gradually took a place in the organization of the town government. Many craft-guilds, the heads of which were concerned in the government of the commune, are found in Italy between the ninth and twelfth centuries.<sup>2</sup> But in England and the north of Europe the

<sup>1</sup> Norton's Commentaries on the History of London.

<sup>2</sup> Perren's Hist. de Florence.

guilds-merchant during this period, having grown rich and tyrannical, excluded the landless men of the handicrafts; these then uniting among themselves, there arose everywhere by the side of the guilds-merchant the craft-guilds, which gained the upper hand on the Continent in the struggle for liberty in the thirteenth and fourteenth centuries. In England these companies usually existed side by side with the old town or merchant-guild, until at length their increasing importance caused the decay of the old guilds, and the adoption of these crafts as part of the constitution of the towns (thirteenth to fifteenth century). The separation of the richer, and perhaps the older, from the poorer of the companies occurred, and thus arose the paramount influence of a few, — as the twelve great companies of London, the *Arti Majori* of Florence, and others.

“The constitution of the trade-guilds was formed on the model of other guilds: they appointed a master or alderman and other officers, made ordinances, including provisions for religious observances, mutual help and burial; the town ordinances yet remaining of many places, as of Berwick, Southampton and Worcester, show traces of the trade laws of the old guild-merchant. As their principal objects, ‘the craft-guildmen provided for the maintenance of the customs of their craft, framed further ordinances for its regulation (including care against fraudulent workmanship), saw these ordinances properly executed, and punished the guild-brothers who infringed them. Though the craft-guilds, as voluntary associations, did not need confirmation by the authorities at their birth, yet this confirmation became afterwards of the greatest importance, when these guilds wanted to be recognized as special and independent associations, which were thenceforth to regulate the trade instead of the authorities of the town.’<sup>1</sup> Hence obtained the practice of procuring a charter in confirmation

<sup>1</sup> Brentano; History and Development of Guilds.

and recognition of their laws, in return for which certain taxes were paid to the king or other authority. It is therefore erroneous to state, as is sometimes done, that these companies owe their origin to royal charter, or that they required a license.”<sup>1</sup>

§ 7. **Decay of Guilds, Their Successors.**—Under the influence of the refinements of civilization and the new necessities of commerce, as well as the strong arm of the Reformation and changing human tastes and recreations, the social, merchant and craft guilds practically lost their popularity and power, and even their very being, though a few of the latter may even yet be in existence. The social guilds were succeeded by the modern friendly societies and social and literary clubs, and probably also in part by the great secret fraternities like the Freemasons and Odd-fellows. The merchant guilds gradually disappeared and our present Boards of Trade and Chambers of Commerce grew up. The craft guilds may be looked upon as in one sense the parents of the Trade Unions of the present century. Of these clubs, secret fraternities and the English friendly societies, we shall speak in the order named.

§ 8. **History of Clubs.**—Clubs have been said to be the natural and necessary off-shoot of men’s gregarious and social nature, and the records of nations show that they have flourished in all countries from the beginnings of history. They were particularly numerous in the prosperous days of Greece and Rome, and interesting statements are made of their workings and influence. They were religious, commercial, political or merely social, according to the class of people who were members, though the most of them were a species of craft guilds, or formed for religious purposes. All, undoubtedly, combined pleasure with business, or worship, and met for social relaxation.

<sup>1</sup> L. Toulmin Smith in *Encyclopædia Britannica*; article “Guild.”



In ancient times the State did not always countenance the worship of strange gods, so that the devotees of new deities associated together in clubs and met in secret. Little, however, is known of their rites or ceremonies. The great secret organizations, like the Pythagoreans, Essenes, Carmathites and Fedavi, or the grosser Bacchanalians, are described in history, and their philosophical teachings have been the subject for multitudes of essays and ponderous tomes. It is not to our purpose to enter into a prolonged discussion of the work of these dead and buried institutions, we can merely refer to them.

There were, in the early days before the Christian era, or shortly afterwards, many clubs organized for private advantage. "There was nothing in the functions of these clubs to obtain for them a place in the page of history. The evidence, therefore, of their existence and constitution is but scanty. Monumental inscriptions, however, tell us of clubs of Roman citizens in some of the cities of Spain, of a club of strangers from Asia resident in Malaga, of Phœnician residents at Pozzuoli, and of other strangers elsewhere. These all were probably devised as remedies against that sense of *ennui* and isolation which is apt to come over a number of foreigners residing at a distance from their native country. Something of the same kind of feeling may have led to the toleration of a club consisting of old soldiers who had been in the armies of Augustus; these were allowed to meet and fight their battles over again, spite of the legal prohibition of military clubs. Another military club of a different kind existed among the officers of a regiment engaged in the foreign service in Africa. Its existence can have been no secret, for its rules were engraved on pillars which were set up near the headquarters of the general, where they have lately been found in the ruins of the camp. The contribution of each member on admission scarcely fell short of £25, and two-thirds of this sum were to be paid to an heir or representative on

the occasion of his death, or he might himself recover this proportion of his original subscription on retirement from military service. The peculiarity, however, of this aristocratic *collegium* was this, that it provided that a portion of the funds might also be spent for other useful purposes, *e.g.*, for foreign traveling. It is to be presumed that a member who had availed himself of this privilege thereby forfeited all claim to be buried at the expense of his club."<sup>1</sup>

The extent of the clubs of the middle ages is not accurately known, for the difference in those countries between these clubs and the guilds of various kinds was slight. In the early part of the eighteenth century the lodges of Odd-fellows and Freemasons appeared, tracing their ancestry back to the remote ages of antiquity, and perpetuating to some extent the ancient rituals of very old secret organizations. The true precursors of the Masons were probably the mediæval building organizations, for example, the stone-masons of Germany, who had religious ceremonies, oaths, benefits, burial funds and registers, and officers by whom they were instructed in secret. Such associations existed in Gaul and Britain for centuries and as early as the twelfth century the Bauhütten had a general association, secret signs and ritual, and graded divisions or degrees. The word lodge first occurs in 1491 in a statute governing the Masons at Edinburg.<sup>2</sup>

The Freemasons and Odd-fellows had their mystic signs of recognition, secret initiatory rites and ceremonies, various grades of dignity and honor, and performed extensive social and benevolent work. They now number their members by millions.<sup>3</sup>

<sup>1</sup> Canon J. S. Northcote in *Encyclopædia Britannica*.

<sup>2</sup> *Encyclopædia Britannica*, art. "Freemasons."

<sup>3</sup> In 1881 in Great Britain there were 10,000 lodges of Freemasons with 1,000,000 members or more, and over 500,000 Odd-fellows. In America there are even a larger number of both orders. In 1881 the British Odd-fellows had a capital of over five million pounds sterling. *Encyc. Brit.*

The modern clubs of Europe are numerous and wealthy, and have been organized for literary and political, as well as for social objects, and in London especially some are flourishing whose names are known throughout the world. The courts were at an early period called upon to adjudicate concerning the individual liability of the members of these clubs for the debts of the association as well as the remedies of members unjustly expelled.<sup>1</sup> In America clubs are increasing rapidly and few cities of any size can be found where they do not exist, while lodges of the great secret fraternities are in every village, and have been and are immensely popular.

**§ 9. Analogies between Ancient and Modern Clubs.—**Many analogies can be traced between ancient and modern clubs and the ecclesiastical, political and secret societies of recent times. Viewed from a legal standpoint, they are all formed upon essentially the same principles. Generally, they are unincorporated voluntary associations, but in probably every State they may incorporate under acts of the legislatures regulating the formation of corporations for benevolent, charitable and educational purposes. By the provisions of these statutes they are allowed special privileges, while in most States churches are further recognized and given exemption from taxation, because of their conserving and helpful influence over the people, and the absence of any objects of pecuniary advantage to their members.

Although numerous cases are found in the courts relating to the rights, privileges and responsibilities of these ecclesiastical organizations and their members, we shall not refer to them, except incidentally and by way of illustration, for ecclesiastical law is a subject worthy of its own individual treatises, and learned authors have considered its theories and principles with great research and ability.

<sup>1</sup> See *ante*, § 2.

§ 10. **The English Friendly Societies.**—In the law which now regulates Friendly Societies in Great Britain,<sup>1</sup> they are defined as “societies established to provide by voluntary subscriptions of the members thereof, with or without the aid of donations, for the relief or maintenance of the members, their husbands, wives, children, fathers, mothers, brothers or sisters, nephews or nieces, or wards being orphans, during sickness or other infirmity, whether bodily or mental, in old age, or in widowhood, or for the relief or maintenance of the orphan children of members during minority; for insuring money to be paid on the birth of a member’s child, or on the death of a member, or for the funeral expenses of the husband, wife, or child of a member, or of the widow of a deceased member, or as respects persons of the Jewish persuasion, for the payment of a sum of money during the period of confined mourning; for the relief or maintenance of the members when on travel in search of employment, or when in distressed circumstances, or in case of shipwreck, or loss or damage of or to boats or nets; for the endowment of members or nominees of members at any age; for the insurance against fire to any amount not exceeding £15 of the tools or implements of the trade or calling of the members.” They are limited in their contracts for assurance of annuities to £50, and for insurance of a gross sum to £200.

These organizations have been more briefly defined to be “the mutual assurance societies of the poorer classes, by which they seek to aid each other in the emergencies arising from sickness and death and other causes of distress.”

The friendly societies of the present time are in one sense the successors of the ancient guilds and some of them are very old, tracing their foundation back as early as 1634. They are supposed by some to have their origin in the burial clubs of early English history, when the desire of the poor

<sup>1</sup> 38 & 39 Vic., c. 60, amended 39 & 40 Vic., c. 32.

to have respectable burial led to the formation of associations, whereby through the co-operation and periodical contributions of many, a fund was established for the purpose of burying their deceased members. The organization of these societies is more complex than that of any of the associations which they have succeeded and they proceed on a different principle, though the modern may be the natural results of the improvements of each successive generation over the methods of that preceding. In all there is the common provision for a contingent event by a joint contribution; but the friendly society has attempted "to define with precision what is the risk against which it intends to provide, and what should be the contributions of the members to meet that risk."

In the eighteenth century these societies were numerous, and in 1793 their existence was recognized by what is known as Sir George Rose's Act, by which they were styled "societies of good fellowship" and given encouragement by special privileges. The benefits offered by this statute were eagerly received and in the county of Middlesex alone nearly a thousand societies were enrolled in a few years after the passage of this act. This prosperity was succeeded by depression and failure of many societies and general mistrust. For the purpose of encouraging greater confidence in these organizations and affording "further facilities and additional security to persons who may be willing to unite in appropriating small sums from time to time to a common fund," the act of 1819 <sup>1</sup> was passed.

By this statute a friendly society was defined as "an institution, whereby it is intended to provide, by contribution, on the principle of mutual insurance, for the maintenance or assistance of the contributors thereto, their wives or children, in sickness, infancy, advanced age, widowhood, or any other natural state or contingency, whereof the

<sup>1</sup> 59 Geo. III., c. 128.

occurrence is susceptible of calculation by way of average." The act of 1829<sup>1</sup> was a great improvement over the one it displaced and by it the law relating to these organizations was entirely reconstructed. The various acts of 1834,<sup>2</sup> and 1846<sup>3</sup> were still further improvements, and by the latter the present office of "Registrar of Friendly Societies" was established. In 1850<sup>4</sup> and 1855<sup>5</sup> the law was again changed and this was succeeded by the present law passed in 1875,<sup>6</sup> and amended in 1876.<sup>7</sup>

It will be seen, therefore, that the English Friendly Societies have long been recognized by the government as organizations beneficial to society and deserving the support and encouragement of the community. They are now under a careful supervision, as much so as the more pretentious life insurance companies, and they are required to make regular returns to the chief registrar; special provisions are also made by the laws for the restraining power of the courts and the winding up of the societies when insolvent.<sup>8</sup>

<sup>1</sup> 10 Geo. IV., c. 56.

<sup>2</sup> 4 & 5 Wm. IV., c. 40.

<sup>3</sup> 9 & 10 Vic., c. 27.

<sup>4</sup> 13 & 14 Vic., c. 115.

<sup>5</sup> 18 & 19 Vic., c. 63.

<sup>6</sup> 38 & 39 Vic., c. 60.

<sup>7</sup> 39 & 40 Vic., c. 32.

<sup>8</sup> For most of these facts we are indebted to a very full and carefully prepared article in the last edition of the *Encyclopædia Britannica* by E. W. Brabrook. From that essay it seems that these societies are divided by the registrar into thirteen classes, ranging from the affiliated societies, or "orders," to cattle insurance societies. There are also "general societies," of which 8 in London have 60,000 members; county societies with 30,000 members; local town societies; "collecting societies," of which 329 have over 680,000 members and £203,777 of funds; "annuity societies," female societies; workingmen's clubs, etc. In the period between 1793 and 1855 it is stated that 26,034 societies registered under the various acts. In 1876, 11,282 furnished returns, though 26,087 were presumed to be in existence, and these had 3,404,187 members and £9,336,946 funds. Twenty-two returned over 10,000 members each and nine over 30,000 members. One society, the "Royal Liver Friendly So-

**§ 11. The American Beneficiary Orders.** — The American benefit societies or orders, resemble most the English friendly societies, although they have many of the characteristic features of the great secret orders like the Freemasons and Odd-fellows. Most of them have a secret organization and ritual, with mystic signs and pass-words, are oath-bound and have grades or degrees of honor. The local lodges are generally under the supervision of grand lodges, composed of delegates from the local bodies; and these in turn acknowledge the supremacy of a supreme lodge, made up of representatives from the grand lodges.

The benefits paid are of two kinds, those to sick members for which the local lodges are responsible, and a specific sum to be paid on the decease of a member to his beneficiary, designated as such in accordance with the rules of the order. This death benefit is paid by the highest body in the order, which is usually incorporated, and, in evidence of the right of the member to have this benefit paid, a certificate is issued to him by this supreme or grand lodge. The amount thus paid in each case ranges from \$500 to \$5,000, and the fund from which it is disbursed is collected by assessments, generally of a definite sum, from one to five dollars, called monthly, or oftener as occasion requires, or as needed when a death occurs. The local lodges act in collecting these assessments as the agents of the grand or supreme lodge.

The local lodges also are supported by monthly or quarterly calls, or dues, which are levied and collected by the lodge direct and used as prescribed by the by-laws of each

ciety" had 682,371 members and £453,418 of funds; another, the "Hearts of Oak," has £179,995 of funds. Besides the registered are a large number of unregistered societies of a kindred nature. Of the first class of registered societies, the Manchester Union of Odd-fellows had in 1878, 456 districts, 4,121 lodges, 526,802 members and £4,325,000 funds and the Order of Foresters had at the same time 287 districts, 4,414 courts, 521,416 members and £2,497,000 of funds.

body. The sick benefits are paid out of this lodge fund. These local lodges enroll the new members, or receive them by a secret ceremonial, but before initiation the applicants must pass a medical examination, the report of which must be usually approved by a supervising medical authority, after which they are initiated in due form and become full fledged members.<sup>1</sup>

<sup>1</sup> The oldest of the leading beneficiary orders, with the life insurance feature, in the United States is the Ancient Order of United Workmen. It was organized in Pennsylvania in 1868 and now has lodges in nearly every State and its total membership is about 204,000. It pays a benefit of \$2,000, and consequently has risks outstanding of \$408,000,000. Since its organization it has paid to the beneficiaries of deceased members upwards of \$20,000,000. The next largest order is the Knights of Honor, organized soon after the A. O. U. W., which now has a membership of 125,000 and since it began business has paid out to its beneficiaries \$23,750,000 on 12,077 deaths.

The following is an approximately correct list of the leading beneficiary orders in the United States and their aggregate membership, which is compiled partly from official sources and partly from data in the fraternal press:

Ancient Order United Workmen	.	.	.	.	204,000 members.
Knights of Honor	.	.	.	.	125,000 "
Royal Arcanum	.	.	.	.	85,000 "
American Legion of Honor	.	.	.	.	65,000 "
Knights and Ladies of Honor	.	.	.	.	40,000 "
Order Chosen Friends	.	.	.	.	33,000 "
Knights of Pythias, Endowment Rank	.	.	.	.	17,000 "
Knights of Maccabees	.	.	.	.	18,000 "
Equitable Aid Union	.	.	.	.	17,000 "
Empire Order Mutual Aid	.	.	.	.	8,000 "
Royal Templars of Temperance	.	.	.	.	22,000 "
United Order Am. Mechanics	.	.	.	.	40,000 "
Order United Friends	.	.	.	.	12,000 "
Select Knights A. O. U. W.	.	.	.	.	15,000 "
Order Golden Cross	.	.	.	.	9,000 "
Knights Golden Rule	.	.	.	.	9,000 "
Home Circle	.	.	.	.	5,000 "
Knights Columbia	.	.	.	.	2,000 "
Independent Foresters	.	.	.	.	6,000 "
Legion of Honor	.	.	.	.	5,000 "
National Union	.	.	.	.	6,000 "
Catholic Knights of America	.	.	.	.	20,000 "
Other societies unnamed	.	.	.	.	50,000 "
Total membership	.	.	.	.	813,000 "

If we allow \$2,000 as the average benefit paid in these orders (and some pay as high as \$5,000) we have the enormous sum of \$1,626,000,000



§ 12. **The Secret Fraternities.** — Closely allied to the beneficiary, or mutual aid life insurance organizations, are the secret ritualistic societies and charitable fraternities, whose characteristic features are good-fellowship, social enjoyment and benevolence. The Freemasons, Odd-fellows and Knights of Pythias are examples. These numerous societies are secret in their organization and work, use a ritual and have initiatory ceremonies and their members are pledged to secrecy. They are organized on the plan of local assemblies or lodges under the government and control of grand or supreme lodges. Some, like the Masons, make no promise of financial aid to members, but are charitable only, donating when necessity requires. Others, such as the Odd-fellows, expressly agree to pay stated amounts to their members in sickness or disability and at death a certain sum for funeral expenses, and also to look after the widow and orphan. These societies have no life insurance feature.<sup>1</sup>

as the aggregate of beneficiary life insurance now carried in the United States and Canada. For the facts here and subsequently stated relating to these beneficiary orders, we are indebted largely to the fraternal press of the United States, but have obtained information from the published reports and documents of the orders and private sources.

<sup>1</sup> The Independent Order of Odd-fellows was the first fraternal society in America to guaranty to its members a certain amount of money in event of sickness and for a funeral benefit. It was founded in this country in 1819, and now has about 8,500 lodges and 530,000 members, and during its existence has disbursed to its beneficiaries upwards of fifty million dollars. The largest secret fraternal society is the Masonic Order, which now has a membership in this country of over 600,000 members, and has expended millions of dollars in unostentatious charity. The Knights of Pythias, which was originated within the last half century, has a membership of probably 175,000.

On principle, a distinction should be made between the mutual aid or beneficiary orders proper, having a life insurance feature, and the purely charitable and fraternal societies, whose donations are more strictly charities, but this cannot always be done. In nearly every large city, there are local orders not known away from the vicinity, and throughout the United States are numerous Hebrew, Scottish, English and other organizations deriving their membership from some one nationality, creed

§ 13. **Allied Organizations.**— In connection with the Masonic, Pythian and Odd-fellows' orders are in many States associations formed for mutual life insurance, whose membership is drawn exclusively from the societies in aid of which they are organized. These organizations are distinct and separate from the orders, are strict business companies and are life insurance companies, operating on the assessment plan instead of on the principles underlying the scientific theory of life insurance.

There are also in this country a large number of regular corporations, formed for the conduct of the business of life insurance on the plan of the benefit societies,—the collection of frequent periodical assessments as required to meet death losses. The business of these companies is regular life insurance conducted upon a new theory, for, except in this respect, they do not differ from the regular life insurance companies with which all are familiar.

§ 14. **Characteristics in Common.**— As we have progressed with the consideration of these social, benevolent mutual aid societies as well as other organizations for the mutual assistance of their members, in their field of work, we have found that, while all fraternal associations have the characteristic features of the regular clubs which have often figured in the courts, many have the additional feature of agreeing to pay a certain sum on the death of a member to his designated beneficiaries; and these have the dual nature of which we spoke at first,<sup>1</sup> and are business

or religious sect. Among these, omitting the various branches or degrees of the Masonic and Odd-fellows' orders and those mentioned in the last note, are the Ancient Order of Druids, O. D. H. S., Sons of Hermann, I. O. T. B. (True League), Order of the Iron Hall, Seven Wise Men, Good Ladies, Plattdeutsche, I. O. B'nai B'rith, Knights of Father Mathew, Ancient Order Hibernians, Bohemian Slayonian Benevolent Association, Order of Tonti, Improved Order of Red Men, A. and I. Order of Malta, Knights of the Golden Eagle and Order of Sparta.

<sup>1</sup> *Ante*, § 1.

companies as well as social fraternities. This business we shall see <sup>1</sup> is, legally speaking, life insurance in form and substance, although in a philosophical sense it is not technical and scientific life insurance. In discussing the questions that have arisen and are likely to arise in the conduct of these societies, it will be necessary to consider the law of life insurance as laid down by the courts of this and other countries.

§ 15. **Definitions of Life Insurance.** — The definitions of life insurance are numerous, but they do not differ except in the forms of expression. Without attempting to coin a new one we will refer to some given by the English courts and then state that now most approved of in the United States.

§ 16. **The English Definitions.** — In the great case of *Dalby v. India and London Life Assurance Company*,<sup>2</sup> in explaining the difference between the contract of life assurance and that of fire or marine insurance, holding that the former is not, like the latter, a contract of indemnity, Baron Parke said: “The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, — the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.”

<sup>1</sup> *Post*, § 51.

<sup>2</sup> 15 C. B. 365; 3 C. L. R. 61; 24 L. J. C. P. 2; 18 Jur. (Ex. Ch.) 1024.

Bunyon, the English insurance writer, after quoting the definition of Chief Justice Tindal,<sup>1</sup> that it is a contract in which a sum of money is paid as a premium in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency, adds: "The contract of life insurance may be further defined to be that in which one party agrees to pay a given sum, upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments by another."<sup>2</sup>

§ 17. **American Definition.** — The American definition most generally approved is that of Justice Gray, of the Supreme Court of Massachusetts, as follows:<sup>3</sup> —

"A contract of insurance is an agreement, by which one party, for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire insurance and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract."<sup>4</sup>

<sup>1</sup> *Patterson v. Powell*, 9 Bing. 320.

<sup>2</sup> Bunyon on Ins. 1.

<sup>3</sup> *Commonwealth v. Wetherbee*, 105 Mass. 149.

<sup>4</sup> See *post*, § 51; *New York L. Ins. Co. v. Statham*, 93 U. S. 24.

§ 18. **Various Classes of Life Insurance.** — There are two principal classes of life insurance, each consisting of several varieties. The first class are those in which the sum insured is certain to become payable, provided only the insurance is duly kept in force; the second are those which are of a temporary or contingent character, so that the sum insured may or may not become payable, according to circumstances.

To the first class belong the great bulk of the transactions of life insurance companies, namely:—

(a.) *Whole Term Assurances on Single Lives.* — These are contracts to simply pay a certain sum, with or without dividends, on the death of the person named in the policy whenever that may occur. Usually the premium, or consideration for the policy is an annual sum payable during the whole continuance of the policy. It may, however, be arranged differently, as by a single payment at the beginning of the transaction; or a limited number of contributions, each larger than the annual premium for the whole of life; or by a modified rate during a limited period and thereafter a correspondingly higher rate.

(b.) *Endowment Assurances.* — In these the sum insured is payable to the assured if he should survive a certain period, or attain a specified age, or to his representatives at his death, if that should occur before such period has expired.

(c.) *Insurances on Joint Lives.* — Here two or more lives are included in the policy and the sum insured is payable when either or any one of them dies.

(d.) *Longest Life Assurances or Insurance on Last Survivor.* — These cover two or more lives, but mature on the death of the last survivor instead of upon the death of any one of the parties.

There are two varieties of the second class named above:

(a.) *Temporary or Short Period Insurances.* — These are affected for short periods to cover special contingencies,

the sum insured becoming payable only if death should occur during the time specified in the policy, just as policies of fire insurance. These may be upon one or more lives, payable on the end of one, or of both, or if one should fail before the other as in the next variety.

(b.) *Survivorship Insurances, or on One Life Against Another.* — In these the sum insured is payable at the death of A. if that should happen in the lifetime of B., but not otherwise. Should B. die before A. the transaction fails.<sup>1</sup>

§ 19. *Assurance and Insurance.* — The words “insurance” and “assurance” are synonymous<sup>2</sup> and are used indiscriminately. One of the earliest English writers,<sup>3</sup> however, says: “The terms *insurance* and *assurance* have been used indiscriminately for contracts relative to life, fire and shipping. As custom has rather more frequently employed the latter term for those relative to life, I have in this volume entirely restricted the word *assurance* to that sense. If this distinction be admitted, *assurance* will signify a contract dependent on the duration of life, which must either happen or fail, and *insurance* will mean a contract relating to any other uncertain event, which may partly happen or partly fail. Thus, in adjusting the price for insurance on houses and ships, regard is always had to the chance of salvage arising from partial destruction.” Other writers have sought to establish fanciful distinctions, as that a person, *insures* his life, his house or his ships, and the company *assures* to him in each of these cases a sum of money payable upon their injury or destruction. Another is that *assurance* represents the principle, and *insurance* the practice.

Were we to discriminate we would say that, in life insurance contracts, if the policy is payable to the person whose

<sup>1</sup> G. M. Low, Actuary, in *Encyclopædia Britannica*, art. “Insurance — Life.”

<sup>2</sup> Bouvier L. Dic.

<sup>3</sup> Babbage on Assurance of Lives (1826.)

life is covered, or his legal representatives, he is the *insured*, while if it is payable to some one else, such person is the *assured*. In other words, the party whose death determines the contract is the *insured*, while he for whose benefit it is made and to whom it is payable is the *assured*. Strictly speaking, however, there is no difference in the meaning of the two words.

Where a policy of life insurance shows upon its face that it was applied for and the premium paid by another person and that it was issued for his benefit, the words "the assured" in the policy apply to the person for whose benefit the policy was effected, and not to the party whose life was insured.<sup>1</sup>

§ 20. **History of Life Insurance.**—The first regular life insurance company was probably "The Amicable Society for a Perpetual Assurance Office," founded in London in 1706 by royal charter. The scheme was simply to raise a fixed contribution from each member, and from the proceeds to distribute a certain sum each year among the representatives of those who died during the year. None could be admitted under the age of twelve nor above fifty-five (afterwards altered to forty-five) and all paid the same rate of contribution. In 1734 arrangements were made by the society for guarantying that the dividend for each deceased member should not be less than £100. In 1807 the company began to rate members according to their age and received a new charter. Soon afterwards charters were granted to the Royal Exchange and the London Assurance companies, which included life insurance among their schemes and have continued in business until now. The latter part of the century saw the development of the theory of life contingencies and the Northampton tables supplied what was believed to be a sound basis for calculations on the

<sup>1</sup> Conn. Mut. L. Ins. Co. v. Luchs, 108 U. S. 498.

duration of life. In 1762 "The Society for Equitable Assurances on Lives and Survivorships" began business and its success further encouraged the new enterprise. The present century began with eight life assurance offices in existence in Great Britain, one of which, the Pelican, founded in 1797, is still in a flourishing condition. In 1844 the first insurance law was passed by Parliament, and after various amendments was succeeded in 1870 by the present Life Assurance Companies Act, by the terms of which a deposit with the Court of Chancery was required and frequent reports were to be made to the Board of Trade. Previous to the existence of regular companies for life insurance the business was sometimes carried on in the same manner as marine and fire insurance, by individuals who, in conjunction or alone, underwrote certain amounts on the risk.<sup>1</sup>

§ 21. **An Early English Case.** — One of the earliest life insurance cases in England was the famous one of *Godsall v. Boldero*,<sup>2</sup> decided in 1807, where an assurance had been effected by the plaintiffs on the life of Hon. William Pitt. In this case Lord Ellenborough held that a contract of life insurance was one of indemnity and, though a creditor may insure the life of his debtor to the extent of his debt, yet if, after the death of the debtor, his executors pay the debt to the creditor, the latter cannot afterwards recover upon the policy, although the debtor died insolvent and the executors were furnished the means of payment by a third party. The doctrine of this case was afterwards overruled.<sup>3</sup>

§ 21a. **First American Case.** — The first life insurance case in the United States was that of *Lord v. Dall*,<sup>4</sup> decided

<sup>1</sup> See article Insurance — Life, in *Encyclopædia Britannica*.

<sup>2</sup> 9 East, 72.

<sup>3</sup> *Dalby v. India & London Life Assurance Co.*, 15 C. B. 365, *supra*.

<sup>4</sup> 12 Mass. 115; 7 Am. Dec. 38.



in 1815 by the Supreme Court of Massachusetts. Here an insurance for \$5,000 had been effected for seven months on the life of one Jabez Lord, who was bound on a voyage to South America. Of this amount the defendant had underwritten five hundred dollars or one-tenth, thus showing that the business was carried on by individual underwriters. Three defenses were interposed to the action, want of insurable interest, concealment of material facts and the illegality of the transaction,\* the insured being bound on a voyage for the purpose of procuring slaves.

In deciding the case on all points in favor of plaintiff the court referred to the newness of the business and the doubts of its legality, but held that it was legal, using this language: "It is true that no precedent has been produced from our own records of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances; or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid and may be enforced, or damages recovered for the breach of them. It seems that these insurances are not favored in any of the commercial nations of Europe except England; several of them having expressly forbidden them, for what reasons, however, does not appear, unless the reason given in France is the prevailing one, viz.: 'That it is indecorous to set a price upon the life of man, and especially a free-man, which, they say, is above all price.' It is not a little singular that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which, for several centuries has been the

country of established and regulated liberty. This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law; nor anything objectionable on the score of policy or morals. It must then be valid to support an action until something is shown by the party refusing to perform it, in excuse of his non-performance."

**§ 22. Method of Conducting Business.** — The common practice of life insurance companies is to only issue policies upon healthy lives and, before the policy is issued, the applicant is required to answer numerous questions in regard to his family, health, business, age, condition and personal history and undergo a physical examination by a physician. If these preliminaries are satisfactory to the company the contract is consummated. The consideration is the payment of certain sums periodically during the term of the insurance, as annually, semi-annually or quarterly; or the consideration may be paid at one time or in a certain number of payments. This consideration, or premium, varies according to the age of the applicant and is based upon the probable duration of human life, ascertained by experience and shown in certain tables or compilations of statistics. There are many of these compilations of which the best known are the Northampton, Carlisle, and the American Experience, Tables of Mortality.<sup>1</sup>

<sup>1</sup> Several very old tables exist which are now obsolete, such as those of Halley, DeParcieux and others. The first reliable compilation was the Northampton Table. This was constructed by Dr. Thomas Price from the registers kept in the parish of All Saints, Northampton, for the forty-six years, 1735 to 1780. It is said that this table gives the chances of death too high at the younger ages and too low at later ages, but for many years it was the basis of all life contingency calculations and even now is still in use. The Carlisle Table was constructed by Joshua Milne from materials furnished by Dr. John Heysham. These materials comprised two enumerations of the population of the parishes of St. Mary and St. Cuthbert, Carlisle, in 1780 and 1787 (the numbers be-

**§ 23. Analogies between Benefit Societies and Life Insurance Companies.** — From what has been said it already appears that the modern benefit societies are engaged in furnishing to their members substantially life insurance. Like the first life insurance corporation, some of them have a fixed and uniform payment, or assessment, for all ages, while others have graded assessments for different ages. The predominating feature of both benefit societies and life insurance companies is the payment of a specific sum on the death of the person, who is a member of the organization or whose life is insured. In the societies the fund is obtained by a periodical tax upon the members, at stated intervals or as required, sufficient to meet the demand. In the companies the principle is based upon the probable duration of human life and the estimate that a certain number of men can by a, comparatively speaking, small periodical contribution, which is carefully improved at compound interest, pay in, during their aggregate lives, enough to give a specified amount to the beneficiaries of each upon his death.

ing in the former year 7,677 and in the latter 8,677), and the abridged bills of mortality of these two parishes for the nine years, 1779 to 1787, during which period the total number of deaths was 1,840. The care and dexterity with which these tables were compiled made them popular and the figures there given have generally agreed with the experience of the life companies. These two tables are of all lives in a certain district and the mortality in the earlier ages is consequently greater than that of selected lives.

Other tables are in use by life insurance companies in England, such as the Equitable Experience, the Seventeen Offices' experience, which were made from statistics covering 83,905 policies, and the English Life Tables. In America the table generally used, and the one frequently prescribed by law for use by the State insurance departments, is the American Experience Tables, compiled by Mr. Sheppard Homans from the statistics of the Mutual Life Insurance Company of New York City.

It is not germane to this work to examine into the science of life insurance or its processes, except as adjudicated by the courts. For a full and interesting review and explanation of the business the reader is referred to the article, Insurance, in the last edition of the Encyclopædia Britannica, an authority generally accessible.

Both companies and societies have the same careful medical examination, and certificates, and the contracts of both are avoided by the violation of certain agreed conditions, or by misrepresentations prior to entering into the contract. As we continue with the discussion these analogies will become clearer.<sup>1</sup>

There are also life insurance companies operating on the assessment plan of the benefit societies although they are mere business corporations.

**§ 24. Early Beneficiary Life Insurance Cases in the United States.** — Probably the earliest case in the United States involving questions of benefit society life insurance was that of *Wetmore v. Mutual Aid and Benevolent Association of Louisiana*, decided in 1871.<sup>2</sup> This was an action on a policy, issued by defendant, and the defense was breach of a condition relating to the payment of an assessment. The contract was that certain assessments were to be paid by the assured within thirty days after being notified thereof by publication in one daily newspaper for five consecutive days. The company contended that the thirty days began to run from the day of the first publication, but the court held that it began to run from the last day of publication.

The next case was that of *Maryland Mut. Benev. Society, etc., v. Clendinen*, in 1875,<sup>3</sup> where the Court of Appeals of Maryland held that the rights of a member of a benefit society in the sum to be paid upon his death was a mere power to designate the beneficiary, which lapsed if not exercised, and that the benefit was not assets recoverable by his administrator. In 1876 came the case of *Arthur v. Odd-fellows' Beneficial Assn.*,<sup>4</sup> in which the Supreme Court of

<sup>1</sup> See *post*, § 51.

<sup>2</sup> 23 La. Ann. 770.

<sup>3</sup> 44 Md. 429; 22 Am. Rep. 52.

<sup>4</sup> 29 Ohio St. 557.

Ohio decided that the laws and regulations of the society determined the rights of its members, and also that the rights of the member in the benefit was only a power to designate a beneficiary in accordance with such laws.<sup>1</sup> Since these cases the number relating to benefit societies has steadily increased each year.

§ 25. **Definition of Terms used in Insurance.** — The terms ordinarily used in insurance law are thus defined by Phillips:<sup>2</sup> “The party undertaking to make the indemnity is called the insurer or underwriter: the party to be indemnified, the assured or insured. The agreed consideration is called a premium; the instrument by which the contract is made, a policy; the events and causes of loss insured against, risks or perils; and the property or rights of the assured, in respect to which he is liable to loss, the subject or insurable interest.” In respect to the terms applicable to the contracts of benefit societies the organizations are the insurers, and the power to designate recipients of the benefits is in the members. These recipients are called the beneficiaries; the consideration, assessments, or assessments and dues;<sup>3</sup> and the instrument evidencing the contract, the certificate.

<sup>1</sup> *Post*, chap. VII.

<sup>2</sup> Phillips on Insurance, § 2.

<sup>3</sup> *Post*, chap. XI.

## CHAPTER II.

### ORGANIZATION, POWERS AND LIABILITIES.

- § 26. Benefit Societies may be Voluntary Associations or Corporations.
- 27. Legal Status of Voluntary Associations Uncertain.
- 28. Members of Voluntary Associations sometimes not Partners.
- 29. When Societies are Partnerships.
- 30. Cases where no Partnership was held to Exist.
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- 32. Cases where Associations were held to be Partnerships.
- 33. The Declaration of Collyer on Partnership.
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- 58. Dissolution of Incorporated Societies.
- 59. When Equity will Interfere.
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**§ 26. Benefit Societies may be Voluntary Associations or Corporations.** — Benefit societies, like other associations of persons for agreed and lawful purposes, may be simply voluntary associations, or they may become incorporated, either by special act of the legislature in that behalf, or by compliance with the provisions of the general laws authorizing the incorporation of such organizations.

**§ 27. Legal Status of Voluntary Associations Uncertain.** — The legal *status* of unincorporated societies, whether formed for religious, social, benevolent or benefit purposes, has never been satisfactorily determined. The adjudicated cases are not in harmony and the courts have differed in their declarations. As a learned writer<sup>1</sup> has said: “The language of many authorities (particularly those where the peculiar rules applicable to voluntary associations do not seem to have been brought to the attention of the court), proceeds upon the idea that every organization must be either a corporation or a partnership. Many of the cases in the books have been decided upon this principle: Is this society a corporation? No. Then it must be a partnership. But this is not the only alternative. There may be a joint or a common tenancy in property — there may be a mutual or reciprocal agency in transactions for a specified purpose, — and there may be a well-defined organization of the owners of such property, or the actors in such transactions, or both, — an organization even having articles (like a partnership) or having a constitution and by-laws (like the charter and by-laws of a corporation), yet the organization may be in the eye of the law, neither a partnership nor a corporation.” The question is not so much one of definition as of application of well known principles of law to determine the jurisdiction of courts and liabilities of members. As in other cases, more depends upon the nature of

<sup>1</sup> Abbott's note to *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300.

the liability sought to be enforced and the varying facts of the different cases than upon mere abstract doctrines. Under certain conditions the members of a voluntary association may be considered partners, while in a different forum and under other circumstances the same organization will be deemed something else.

§ 28. **Members of Voluntary Associations Sometimes not Partners.** — There are many cases where it has been held that if a number of persons associate themselves together for purposes of charity, benevolence, pleasure, or any other lawful object not trade, or business, or profits, they are generally not to be regarded as among themselves, as partners.<sup>1</sup>

§ 29. **When Societies are Partnerships.** — But in the settlement of disputes among the members, in the division of property, in determining the liabilities of members to creditors, in winding up the societies, and generally in all equitable proceedings, the courts will treat the members as ordinary partners, and the associations as partnerships, yet as far as possible giving effect to the articles of association of the members.<sup>2</sup> These differences will more fully appear

<sup>1</sup> *Thomas v. Ellmaker*, 1 Pars. Sel. Cases, 98; *White v. Brownell*, 3 Abb. Pr. (N. S.) 325; 4 Abb. Pr. (N. S.) 162; *McMahon v. Rauhr*, 47 N. Y. 67; *Lafond et al. v. Deems*, 81 N. Y. 514; *Leech v. Harris*, 2 Brewst. 571; *Tyrell v. Washburn*, 6 Allen, 466; *Smith v. Virgin*, 33 Me. 148; and as to members of mutual insurance companies, *Krugh v. Lycoming F. Ins. Co.*, 77 Pa. St. 15.

<sup>2</sup> *Gorman v. Russell*, 14 Cal. 537; *Protchett v. Schaefer et al.*, 11 Phila. 166; *Bullard v. Kinney*, 10 Cal. 60; *Butterfield v. Beardsley*, 28 Mich. 412; *Beaumont v. Meredith*, 3 V. & B. 180; *Pearce v. Piper*, 17 Ves. 15; *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371; *Reeve v. Parkins*, 2 Jac. & W. 390; *Ellison v. Reynolds*, 2 Jac. & W. 511; *Cockburn v. Thompson*, 16 Vt. 321; *Wallworth v. Holt*, 4 Myl. & Cr. 619; *Adkyns v. Hunt*, 14 N. H. 205; *Womersley v. Merrit*, L. R. 4 Eq. Cas. 695; *Richardson v. Hastings*, 7 Beav. 323; *Whitman v. Porter*, 107 Mass. 522; *Taft v. Ward*, 106 Mass. 518; *Harper v. Raymond*, 3 Bos. 29; *Mann v.*



from the examination of some of the authorities bearing upon the subject.

§ 30. **Cases where no Partnership was held to Exist.** — The Court of Appeals of New York, in passing upon a case where several members of an unincorporated lodge of a benevolent society, called "The Independent Order of Rechabites," brought suit against the others, alleging mismanagement, and seeking to dissolve the lodge and wind up its affairs and distribute its property among the members, said:<sup>1</sup> "Associations of this description are not usually partnerships. There is no power to compel payment of dues, and the right of the member ceases when he fails to meet his annual subscription. This, certainly, is not a partnership, and the rights of the co-partners as such are not fully recognized. The purpose is not business, trade or profit, but the benefit and protection of its members, as provided for in its constitution and by-laws. In accordance with well established rules no partnership exists under such circumstances." In *Caldicott v. Griffiths*,<sup>2</sup> the court said: "The rules do not create a partnership between the members of the society. The question is, whether this is a scheme where certain persons enter into a partnership or *quasi*-partnership, or whether they are like members to a hospital or club. The solution of the question is not to be found by examining the cases with reference to the liability of committeemen or shareholders, but by looking at the rules of the society to see what liabilities they create." In *Flemyng v. Hector*,<sup>3</sup> an action brought by a trades-

Butler, 2 Barb. Ch. 362; *Townsend v. Goewey*, 19 Wend. 424; *Burgan v. Lyell*, 2 Mich. 102; *Claggett v. Kilbourne*, 1 Black, 346; *Brown v. Curtis*, 5 Mason, 421; *Brown v. Gilman*, 4 Wheat. 255; *Brown v. Dale*, L. R. 9 Ch. D. 78; *Adams' Eq.* 247-239-240; *Story Eq. Jur.*, §§ 1243, 1255, 1256.

<sup>1</sup> *Lafond et al. v. Deems et al.*, 81 N. Y. 514.

<sup>2</sup> 22 Eng. L. & E. 529; 8 Ex. 898; 1 C. L. R. 715; 23 L. J. Ex. 54.

<sup>3</sup> 2 M. & W. 171.

man against one of the members of a club, the court said: "This is an action brought against the defendant on a contract, and the plaintiff must prove that the defendant, either by himself or his agent, has entered into that contract. That should always be borne in mind in cases of this class, for on most questions of this kind the real ground of liability is very apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant, unless he shows that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf. \* \* \* It is said in this case that the order was given by the committee, and that they were the agents of the members generally; but the question is, whether there was any sufficient evidence to go to the jury that they were authorized by the defendants to enter into and make these particular contracts in their behalf. \* \* \* These cases resolve themselves into questions of construction as to the meaning of the original rules of the club." In this case the members were held, under the rules, not to be liable for debts contracted by the managing committee.

§ 31. *The Case of Ash v. Guie.* — In *Ash v. Guie*,<sup>1</sup> a case where creditors sought to charge the members of a Masonic lodge for debts incurred in erecting a building, the court said: "A benevolent and social society has rarely, if ever, been considered a partnership. In *Lloyd v. Loaring*<sup>2</sup> the point was not made, but Lord Eldon thought the bill would lie on the ground of joint ownership of the personal property in the members of a Masonic lodge; there was no intimation that they were partners. Where a society of Odd-fellows, an association of

<sup>1</sup> 97 Pa. St. 493; 39 Am. Rep. 818.

<sup>2</sup> 6 Ves. 773.

persons for purposes of mutual benevolence, erected a building, which was afterwards sold at sheriff's sale in satisfaction of mechanics' liens, in distribution of the proceeds, it was said that, as respects third persons, the members were partners, and that lien creditors, who were not members, were entitled to preference as against the liens of members.<sup>1</sup> Had the members been called joint tenants of the real estate the same principle in the distribution would have applied. \* \* \* A mutual beneficial society partakes more of the character of a club than a trading association. Every partner is agent for the partnership, and as concerns himself he is a principal, and he may bind the other by contract, though it be against an agreement between himself and his partners. A joint tenant has not the same power, by virtue of the relation, to bind his co-tenant. Thus one of several co-adventurers in a mine has not, as such, any authority to pledge the credit of the general body for the purposes of the concern. And the fact of his having the general management of the mine makes no difference, in the absence of evidence from which an implied authority for that purpose can be inferred.<sup>2</sup>

“ Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner so that the other members could borrow money on his credit. The proof fails to show that the officers, or committee, or any number of the members, had a right to contract debts for the building of a temple, which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who

<sup>1</sup> *Babb v. Reed*, 5 Rawle, 151; 28 Am. Dec. 650.

<sup>2</sup> *Ricketts v. Bennett*, 4 M. G. & S. 686; 56 E. C. L.

participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge, and so with reference to borrowing money. A member who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts. We are of the opinion that all the members so assenting were liable as partners in their relation to third persons in the same manner as individuals associated for the purpose of carrying on a trade."

§ 32. **Cases where Associations were Held to be Partnerships.** — In *Park v. Spaulding*,<sup>1</sup> also an action brought by a creditor to charge as individuals certain members of a voluntary association called "The Worth Club," the court said: "Its members remained at all times in that nebulous and inchoate condition in which an aggregation of individuals, assuming a name under which they incur liability, are held personally liable for the benefit of creditors by the application of common-law principles. \* \* \* Where such a body of gentlemen join themselves together for social intercourse and pleasure, and assume a name under which they commence to incur liabilities, by opening an account, they become jointly liable for any indebtedness thus incurred; and if either of them wishes to avoid his personal responsibility by withdrawal from the body, it is his duty to notify the creditors of such withdrawal."

The Supreme Court of New York,<sup>2</sup> lays down this rule: "Personal responsibility to the full extent of the indebtedness to third parties can only be avoided by persons constituting any association where they become a corporation or *quasi*-corporation. Companies or societies, which are not sanctioned expressly by the legislature, pursuant to some general or special law, are nothing more than ordinary partnerships and the laws respecting them are the same."

<sup>1</sup> 10 Hun, 128.

<sup>2</sup> *Wells v. Gates*, 18 Barb. 554.

§ 33. **The Declaration of Collyer on Partnership.** — The following strong declaration is from Collyer on Partnership:<sup>1</sup> “Societies and clubs, the object of which is not to share profits, are not partnerships in any sense. \* \* \* It is a mere abuse of words to call such associations partnerships; and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by him who relies on it, for none is implied by the mere act of association.”

§ 34. **The Principle Stated by Another Writer.** — A careful writer thus states the result of his investigations:<sup>2</sup> “The true principle is, and upon this view the apparent discordance in the cases may be nearly reconciled, that the law allows associates to imitate the organization and methods of corporations *so far as their rights between themselves is involved*, and will enforce their articles of agreement (nothing illegal or unconscientious appearing) as between the parties to them. But the public and creditors have a right to invoke the application of the law of partnership to the dealings of any trading association, unless such association has the shield of incorporation. Thus, if the controversy is between members of the association, and relates to such objects as the mode of acquiring membership, tenure of the property, division of the profits, transfer of shares, voting, expulsion, dissolution, or the like, the courts may deal with the association by analogy to the law of corporations, so far as the compact between the members contemplates. But if the question is between the association, or its members, and third parties, and relates to such points as in what name the association may sue, whether members are individually liable to the creditors for debts, etc., a

<sup>1</sup> Wood's edition, 1878, § 29.

<sup>2</sup> Abbott Digest of Corp., tit., Associations.

mere compact of association cannot vary the rights of strangers to it, but the associates must submit to the general rules of law applicable to the questions raised.”

§ 35. **A General Rule.** — The general rule seems to be that the articles of association, or rules, or if there are no such articles of association or rules, then the customs and usages of the members, are to be looked to in order to determine whether the associated individuals are a partnership or not, and to adjust the rights of these individuals among themselves. The questions involved are of construction and of fact. So far as creditors are concerned and outsiders generally their rights are governed by the law of agency, and in each case it will be necessary to ask whether the agents of the association were authorized to contract the obligation, and if so, whether it was contracted in behalf of all the members of the association, or some of them only. Necessarily, the facts in each particular case will decide whether any liability attaches and also its extent.<sup>1</sup>

§ 36. **Liability and Status of Members : Dissolution.** — If one or more members order work done or supplies furnished he or they are personally liable unless credit was

<sup>1</sup> *Ash v. Guile*, 97 Pa. St. 493; *Fleming v. Hector*, 2 M. & W. 171; *Caldicott v. Griffiths*, 22 Eng. L. & E. 529; *Cutler v. Thomas*, 25 Vt. 73; *Hill v. Beach*, 12 N. J. Eq. 31; *Carlew v. Drury*, 1 Ves. & B. 157; *Keasly v. Codd*, 2 Car. & P. 408; *Harrison v. Heathorne*, 6 M. & G. 81; *Pipe v. Bateman*, 1 Ia. 369; *Babb v. Reed*, 5 Rawle, 151; *Carlton v. Southern M. Ins. Co.*, 72 Ga. 371; *Waller v. Thomas*, 42 How. Pr. 337; *Foley v. Tovey*, 54 Pa. St. 190; *Payne v. Snow*, 12 Cush. 443; *Gorman v. Russell*, 14 Cal. 533; *Hess v. Wertz*, 4 Serg. & R. 356; *Pearce v. Piper*, 17 Ves. 15; *Fuller v. Rowe*, 57 N. Y. 23; *Protchett v. Schaefer*, 11 Phila. 166; *Leech v. Harris*, 2 Brewst. 571; *Koehler v. Brown*, 2 Daly, 78; *Richmond v. Judy*, 6 Mo. App. 465; *Ferris v. Thaw*, 5 Mo. App. 279; *s. c.* 72 Mo. 450; *DeVoss v. Gray*, 22 Ohio St. 159; *Heath v. Goslin*, 80 Mo. 310; *Sproat v. Porter*, 9 Mass. 300.

given to the association.<sup>1</sup> The liability of members attaches when they sign the articles of association,<sup>2</sup> although such signing is not a prerequisite of membership,<sup>3</sup> and continues until notice of withdrawal is given;<sup>4</sup> and the law of the place where the association was formed and did business determines such liability.<sup>5</sup> If the relation of partnership exists one member cannot sue the others at law;<sup>6</sup> nor can the majority bind the minority except by consent, or by acting under the articles of association.<sup>7</sup> If the court is satisfied that the association is a bubble and cannot answer the purpose of its creation it will wind it up;<sup>8</sup> and, if necessary, restrain operations by injunction.<sup>9</sup> Where an "unauthorized corporation" or "private society" was organized for the purpose of providing a common fund and erecting tombs for its members, and the latter by its rules are to receive, in return for dues and fees, relief and medical treatment during illness, burial at death, and certain specified assistance to their widows and orphans when left in necessitous circumstances; it was held that the death of any member does not dissolve the association; that the interest in the assets of

<sup>1</sup> *Wells v. Turner*, 16 Md. 133; *Heath v. Goslin*, 80 Mo. 310; *Lewis v. Tilton*, 64 Ia. 220; s. c. 52 Am. Rep. 436; *Hutchinson v. Wheeler*, 3 Allen, 577.

<sup>2</sup> *Dennis v. Kennedy*, 19 Barb. 517.

<sup>3</sup> *United Hebrew, etc., v. Benshimol*, 130 Mass. 325.

<sup>4</sup> *Tenney v. N. E. Protective Union*, 37 Vt. 64; *Park v. Spaulding*, 10 Hun, 128.

<sup>5</sup> *Cutler v. Thomas*, 25 Vt. 73; *Knights of Honor v. Nairn*, 26 N. W. Rep. 826 (Mich.). But see *Taft v. Ward*, 106 Mass. 518, where it is held that members of a joint stock company under the laws of New York are liable to third parties as partners.

<sup>6</sup> *Bullard v. Kinney*, 10 Cal. 60; *McMahon v. Rauhr*, 47 N. Y. 67; *Holmes v. Higgins*, 1 B. & C. 74.

<sup>7</sup> *Livingston v. Lynch*, 4 Johns. Ch. 594; *Torrey v. Baker*, 1 Allen, 120.

<sup>8</sup> *Buckley v. Cater*, stated 17 Ves. 15; *Pearce v. Piper*, 17 Ves. 1; *Ellison v. Bignold*, 2 Jac. & Walk. 511.

<sup>9</sup> *Reeve v. Parkins*, 2 Jac. & Walk. 390; *Gorman v. Russell*, 14 Cal. 538.

a member of the association does not pass to his heirs but lapses in favor of his associates.<sup>1</sup>

§ 37. **The Effect of Articles of Association.** — We shall discuss this question of *status* of unincorporated voluntary associations further when we come to consider the rights and liabilities of members to each other. It is always true, however, as said in *Protchett v. Schaefer et al.*,<sup>2</sup> that “the articles of association are doubtless to be considered in the light of an agreement, between the members, extending or limiting any general obligation, which binds them to each other as members of the partnership.” “The members have established a law to themselves.”<sup>3</sup>

§ 38. **Powers of Voluntary Associations and of the Members.** — An unincorporated voluntary association may do any legal act within the scope of its articles of association or constitution and by-laws, which articles, constitution and by-laws form the contract of the members and fix the powers of their agents, the officers. The principles and rules of partnership and agency determine the right and liabilities of these associations and their members and the questions which arise concerning them are to be adjusted accordingly.<sup>4</sup> If the members knowingly acquiesce in or consent to a departure from the requirements of the laws of the society evidence of this fact is admissible to determine the liability.<sup>5</sup>

<sup>1</sup> *Sociedad Union Espanola v. Docurro*, 1 McGloin (La.), 218. See also *Mason v. Atlanta Fire Co.*, 70 Ga. 604; 48 Am. Rep. 585.

<sup>2</sup> 11 Phila. 166.

<sup>3</sup> *Leech v. Harris*, 2 Brewst. 571; *Tyrrell v. Washburn*, 6 Allen, 466; *Hyde v. Woods*, 2 Sawyer, 655, *affd.* 94 U. S. 523.

<sup>4</sup> *Bullard v. Kinney*, 10 Cal. 60; *Gorman v. Russell*, 14 Cal. 537; *White v. Brownell*, 3 Abb. Pr. (N. S.) 318; *Leech v. Harris*, 2 Brewst. 571; *Ridgley v. Dobson*, 3 Watts & S. 118; *Wells v. Gates*, 18 Barb. 554; *Protchett v. Schaefer et al.*, 11 Phila. 166; *Robinson v. Robinson*, 10 Me. 240; *Dow v. Moore*, 47 N. H. 419; *Fleming v. Hector*, 2 M. & W. 171.

<sup>5</sup> *Henry v. Jackson*, 37 Vt. 431; *Dow v. Moore*, 47 N. H. 419.



The association cannot change the purposes for which it was organized, as specified in its articles of association without the consent of all the members;<sup>1</sup> and although a minority, present at a meeting where money is disposed of for a purpose different from that prescribed in the articles of association, are bound unless they then and there dissent, the vote does not bind those not present.<sup>2</sup> A part of the members cannot bind the others without their consent before the act which it is claimed binds them is done, or they, with knowledge of the facts, ratify and adopt it; although, if the act is clearly in furtherance of the object for which the association is organized, all will be presumptively bound by it.<sup>3</sup>

The Supreme Court of Michigan has held<sup>4</sup> that a Masonic lodge which was in existence before the organization of a corporation of the same name, and which had never by any action authorized or recognized the corporation as formed in the same behalf, and where each had been distinct in meetings, officers, property and other incidents, and not even identical in membership, was not merged in the corporation. The court said: "There is nothing but unanimous consent which can bind any member of an unincorporated company by any action not within the terms of the association. In joint enterprises, matters within the proposed scheme are usually left to be determined by such agencies or such votes as are agreed upon. Outside of the agreement, no one can be bound without his assent."<sup>5</sup> A

<sup>1</sup> *Morton v. Smith*, 5 Bush, 467; *Zabriskie v. Hackensack, etc.*, 18 N. J. Eq. 178; *Marston v. Durgin*, 54 N. H. 347; *Hochreiter's Appeal*, 93 Pa. St. 479; *Torrey v. Baker*, 1 Allen 120.

<sup>2</sup> *Abels v. McKeen*, 16 N. J. Eq. 462; *Ray v. Powell*, 134 Mass. 22; *Keen v. Johnson*, 9 N. J. Eq. 401.

<sup>3</sup> *Sizer v. Daniels et al.*, 66 Barb. 426; *Richmond v. Judy*, 6 Mo. App. 465.

<sup>4</sup> *Mason v. Finch*, 28 Mich. 282.

<sup>5</sup> *Mears v. Moulton*, 30 Md. 142.

voluntary association cannot hold real estate as such;<sup>1</sup> nor take a bequest.<sup>2</sup> The members must exercise good faith towards each other;<sup>3</sup> and they have the right to insist upon a literal carrying out of the provisions of the articles of association in regard to property, though it may not be for the interests of the concern or may be against the will of the majority.<sup>4</sup>

§ 39. **Jurisdiction of Equity.**—The Supreme Court of Vermont has thus laid down the general rule as to the basis upon which a court of equity will act if it entertains jurisdiction over these societies:<sup>5</sup> “If jurisdiction is entertained over them (voluntary associations) by a court of chancery, it appears to me that it will become necessary to examine their constitution, or by-laws, or articles of association, in order to discover the object for which they were formed; and every member contributing, and every one receiving donations, whether styled officer or not, must be considered as having regard to the articles of association, whether they are called constitution or by-laws, and must proceed accordingly. And if it is so provided, the majority may control the minority by a vote, if such vote is for the purposes of the association and within its provisions. The court of chancery has power to see that such asso-

<sup>1</sup> *Baptist Assn. v. Hart*, 4 Wheat. 1; *Kain v. Gibboney*, 101 U. S. 362; *Douthitt v. Stinson*, 73 Mo. 199; *East Haddam etc. v. East Haddam, etc.*, 44 Conn. 259. But see *Bryan v. Bickford*, 140 Mass. 31; *Inglis v. Sailors Snug Harbor*, 3 Pet. 99; *Vidal v. Girard*, 2 How. 127; *Perin v. Carey*, 24 How. 465; *Ould v. Washington Foundling Hosp.* 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163.

<sup>2</sup> *Sherwood v. Am. Bible Soc.* 4 Abb. App. Dec. 227; *Betts v. Betts*, 4 Abb. N. Cas. 317; also authorities last cited. See also *Swift's Executors v. Easton Ben. Soc.*, 73 Pa. St. 362; *Blenon's Estate*, *Brightley*, 338.

<sup>3</sup> *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43; *Getty v. Devlin*, 54 N. Y. 403; *Sizer v. Daniels*, 66 Barb. 426.

<sup>4</sup> *Mann v. Butler*, 2 Barb. Ch. 362; *Torrey v. Baker*, 1 Allen, 120.

<sup>5</sup> *Penfield v. Skinner*, 11 Vt. 296.

ciations are faithful trustees in the disposition of the charitable fund, and will see that it is appropriated to the object designed, and will not suffer it to be diverted, unless with the consent of the contributors. If the object should entirely fail, probably each contributor would be entitled to have his money refunded, and might, or might not, according to the circumstances of the case, have a remedy therefor, either at law or in chancery.”<sup>1</sup>

**§ 40. Voluntary Association may be Estopped from Showing its True Nature.** — A voluntary association may, by holding itself out as a corporation, be estopped from denying its corporate capacity and thus, so far as third parties are concerned, be deemed a corporation.<sup>2</sup> If a partnership association, whose members are partners as between themselves, does business in a corporate name, any person dealing with the association in that name may hold the members liable as partners, although he did not know the real character of the association at the time. The liability of the members of the association under these circumstances arises from the fact that they are actually partners as between themselves.<sup>3</sup>

**§ 41. Defective Organization of Corporation.** — The same rule applies to the members of an acting corporation, the organization of which, however, is defective, as to parties who have contracted with a corporation as such, and, after having received the benefit of the contract, seek to avoid it on the ground that it had no authority to contract in a corporate capacity; the right of a member to pecuniary benefit from the association by virtue of his membership

<sup>1</sup> *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392.

<sup>2</sup> *Tarbell v. Page*, 24 Ill. 46; *Baker v. Backus*, 32 Ill. 79; *Independent Order Mut. Aid v. Paine* (Ill.), 11 West. R. 701; 14 N. East. Rep. 42; *Morawetz on Corp.*, § 752.

<sup>3</sup> *Morawetz on Corp.*, § 749, and cases cited.

must stand upon the basis that it is a corporation *de facto*.<sup>1</sup> Whether or not, in cases where the organization of the corporation is defective and the requirements of law have not been met, so that there is no legal corporation, the members are liable as partners, is one of those questions upon which there is an almost equal division of opinion and the decisions are conflicting. A leading writer<sup>2</sup> has collected the various cases bearing on the subject and concludes that the weight of authority is in the favor of a rule that "if an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly, as partners."<sup>3</sup>

**§ 42. Benefit Societies Incorporated under Special Acts.** — Benefit societies are often incorporated under special acts of the legislature, the charters in such cases forming contracts between them and their members to be construed like other contracts. Unless expressly forbidden by the constitution State legislatures can create corporations for any purpose.<sup>4</sup> Corporate powers, however, cannot be created by implication or extended by construction.<sup>5</sup>

**§ 43. General Incorporation Laws.** — The policy of the American States has been to encourage the formation of

<sup>1</sup> *Foster v. Pray*. (Minn.), 29 N. W. Rep. 155; *Independent Order Mut. Aid v. Paine* (Ill.), 11 West. Rep. 701; 14 N. East. R. 42; *Morawetz on Corp.*, § 750; *Railroad Co. v. Cary*, 26 N. Y. 75; *Chubb v. Upton*, 95 U. S. 665.

<sup>2</sup> *Morawetz on Corp.*, § 748.

<sup>3</sup> *Blanchard v. Kaull*, 44 Cal. 440.

<sup>4</sup> *United States Trust Co. v. Brady*, 20 Barb. 119; *Bishop v. Brainerd*, 28 Conn. 289; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Aurora v. West*, 9 Ind. 74.

<sup>5</sup> *Pennsylvania R. Co. v. Canal Commissioners*, 21 Pa. St. 9; *Stewart v. Father Matthew Soc.*, 41 Mich. 67.

corporations and to this end, and to avoid any appearance of discrimination, general laws exist by compliance with the terms of which corporations may be organized for almost every imaginable purpose.<sup>1</sup> Benefit societies in practically all the States are not regarded as strictly charitable and benevolent organizations, although they may become incorporated under the provisions of the laws providing for the incorporation of such societies. It is an essential, however, that they have no capital stock and be not formed for pecuniary profit to the members.

§ 44. **Benefit Societies as Charities.** — The extent to which these associations are to be regarded as charities has often been discussed. The Supreme Court of Indiana,<sup>2</sup> has said “a corporation which promises to pay a certain sum as benefits during a member’s illness in consideration of his payment of dues, is not a purely benevolent organization; it may be and doubtless is benevolent and charitable in a great degree, but it is not a benevolent organization in the sense of dispensing benefits without consideration.” In California, the Supreme Court<sup>3</sup> held, in a suit brought to dissolve the “Riggers and Stevedore’s Union Association,” as follows: “This is a voluntary association, formed for the benefit of the members of it. It partakes of the nature of a partnership. We do not see why a number of persons, capable of contracting, may not associate and agree, as the basis and consideration of the association, that the funds raised by voluntary contribution, or otherwise, through the by-laws of the company, shall be appropriated absolutely or in a given contingency, to the benefit of the individual members. This is such an agreement. A number of the members of a particular avocation meet for mutual

<sup>1</sup> Morawetz on Corp., §§ 8, 9 and 10.

<sup>2</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262.

<sup>3</sup> *Gorman v. Russell*, 14 Cal. 535.

benefit and protection, and prescribe rules for the government of the society thus organized. They agree that each shall contribute a certain fixed sum to the common treasury, and that this sum shall be applied in a certain event, as in sickness, etc., to the relief of the necessities or wants of the individual members or of their families. This is not a charity any more than an assurance society against fire, or upon life, is a charity. It is simply a fair and reciprocal contract among the members to pay certain amounts, in certain contingencies, to each other, out of a common fund.”<sup>1</sup> Masonic lodges have been held to be charities, and as such exempted from taxation,<sup>2</sup> though as to this latter point the contrary has been held.<sup>3</sup> In Alabama<sup>4</sup> the Supreme Court held that it would take judicial notice that the grand and subordinate lodges of the Masonic society within that State constituted a charitable or eleemosynary corporation. In a New Hampshire case,<sup>5</sup> the plaintiff sued to recover his share of the funds of a Masonic lodge whose members had voted its dissolution and division of its property, and the court held that the action could not be maintained, as the society was for charitable purposes and the funds were in the custody of the lodge for charitable uses.<sup>6</sup> As bearing on this question, whether benefit societies are to be considered charities, we may cite the test laid down by the Supreme Court of Pennsylvania.<sup>7</sup> “Private or indi-

<sup>1</sup> See *Goodman v. Jedidjah Lodge* (Md.), 8 Cent. Rep. 278; 9 Atl. Rep. 13; *Miner v. Mich. Mut. Ben. Assn.* (Mich.), 6 West. Rep. 117; 29 N. W. Rep. 852; dissenting opinion *Sperry's Appeal* (Pa.), 8 Cent. Rep. 215; 9 Atl. Rep. 478; *Bauer v. Sampson Lodge*, 102 Ind. 262.

<sup>2</sup> *Indianapolis v. Grand Master*, 25 Ind. 518; *Mayor, etc., v. Solomon's Lodge*, 53 Ga. 93; *State v. Addison*, 2 S. C. 499.

<sup>3</sup> *Morning Star, etc., v. Hayslip*, 23 Ohio St. 144; *Bangor v. Masonic Lodge*, 73 Maine, 429.

<sup>4</sup> *Burdine v. Grand Lodge*, 37 Ala. 478.

<sup>5</sup> *Duke v. Fuller*, 9 N. H. 536; 32 Am. Dec. 392.

<sup>6</sup> See also *Spiller v. Maude*, 10 Jur. (N. S.) 1089; 13 W. R. 69.

<sup>7</sup> *Burd Orphan Asylum v. School District, etc.*, 90 Pa. St. 29.

vidual gain, in a pecuniary sense, is not the sole test. 'The true test is to be found in the objects of the institution.' Where these are to advance the interest of a party, of an association, of a private corporation, of a religious denomination, and the like, however beneficial to the public their growth and success may be, there is a private object to gain; the institution is not unqualifiedly public. In such case the purpose is wholly private or the private blends with the public?" In the same case on rehearing the court thus construed the word "purely" as used by statutes in reference to benevolent and charitable organizations: "As to the meaning of the word 'purely,' when used in this connection, we concur in the construction which was given by the Supreme Court of Ohio in the case of *Gerke v. Purcell*,<sup>1</sup> that, 'when the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of 'purely,' as applied to public charity in the constitution.'"<sup>2</sup> We shall refer to this subject again in discussing the relations of benefit societies to the insurance laws of the several States.<sup>3</sup> But it may be here said that "a charitable corporation is not an association of shareholders, like a business corporation or joint stock company; but is merely an agent or trustee for the administration of trust funds, and the beneficiaries of the trust are the donees of the charity, and not the members of the corporation."<sup>4</sup> This definition sheds light on the subject for, tried by this test as well as others, benefit societies are seldom, if ever, "charities" in the strict sense of the word.

**§ 45. English Friendly Societies not Charities, nor Assurance Companies.** — The English friendly societies

<sup>1</sup> 25 Ohio St. 229.

<sup>2</sup> See note to *Henepin v. Brotherhood of Gethemane*, in 38 Am. Rep. 298—(same case 27 Minn. 460) and cases there cited.

<sup>3</sup> *Post*, §§ 50 and 53.

<sup>4</sup> *Morawetz on Corp.*, § 34.

are not regarded by the courts of that country as charitable institutions, and it has been held that where a bequest is made to such a society and the society is wound up the doctrine of *cy pres* will not apply.<sup>1</sup> Neither is such a friendly society an assurance company, within the meaning of a covenant contained in a marriage settlement, whereby the husband agreed that he would forthwith effect a policy of assurance upon his life with some respectable assurance company for a certain sum and assign the policy to trustees. A policy of assurance effected with a friendly society, if it be not assignable, or if it be less beneficial than a policy effected with an ordinary assurance company, it was said,<sup>2</sup> is not within the meaning of such covenant.

§ 46. **Incorporating Under General Laws.** — Under the general corporation laws all persons who comply with the prescribed conditions may become a corporation. A substantial compliance with all the terms of the law is a prerequisite and, though in the first instance the secretary of State, or other person charged with the duty of filing articles of incorporation and issuing a certificate thereof, may decide whether the provisions of the statute have been complied with, the ultimate decision rests always with the courts.<sup>3</sup> A recent able writer on the subject has so concisely stated the law of organization of corporations under the general law that we cannot do better than to quote his words: "A substantial compliance with all the terms of a general incorporation law is a prerequisite of the right of forming a corporation under it. Thus, where it is provided that a certificate, or articles of association, setting forth the purposes of the corporation about to be formed, the amount of its capital and other details, shall be filed with some public

<sup>1</sup> *Re Clark*, 1 L. R. Ch. D. 497; L. J. Ch. 194; 24 W. R. 233.

<sup>2</sup> *Courtenay v. Courtenay*, 3 Jones & La. T. 519.

<sup>3</sup> *Morawetz on Corp.*, §§ 15 and 27.



officer, a performance of this requirement is essential; and until it has been performed, the association will have no right whatever to assume corporate franchises. So, under some statutes, a license or certificate must be issued by a specified public officer before the corporation can be legally formed. The articles of incorporation must contain everything in substance that the laws under which the corporation is organized prescribe. Thus, if it is prescribed that the number or the names of the first directors of the corporation shall be set forth, a compliance with this provision is essential. A provision requiring the articles of incorporation to set forth that a majority of the members of the association voted at the first election of directors is obligatory; and if the articles omit the required statement, proof cannot be admitted to show that a majority were in fact present and voted. Under a law requiring a certificate to be filed showing the manner of carrying on the business of the association, it is not sufficient to state merely that the manner of carrying on the business shall be such as the association may, from time to time, prescribe by rules, regulation and by-laws. Any other conditions precedent imposed by the express terms of the law must, of course, be complied with before the corporators can lawfully form a corporation. Upon the same general principle it follows that a corporation cannot lawfully act in a foreign State and carry on business there, until all conditions precedent, prescribed by the laws of such State, have been performed.”<sup>1</sup> The Supreme Court of Ohio<sup>2</sup> held that where the certificate provided that the manner of carrying on the business should be such as the association should, “from time to time, prescribe by its rules and by-laws,” not inconsistent with the State laws, it did not sufficiently comply with the statute requiring the certificate to specify

<sup>1</sup> Morawetz on Corp., §§ 27 and 28; also §§ 641, 645, 939.

<sup>2</sup> State v. Central Ohio Relief Association, 29 Ohio St. 407.

“the manner of carrying on the business.” A general incorporation act can never be extended by construction to cases not reasonably within its terms. Upon this point the Supreme Court of Michigan has said:<sup>1</sup> “The present association was probably incorporated under the act in question, not as being precisely applicable, but as coming nearer to the purposes sought than any other statute. But it must always be remembered that no act for creating corporations can ever be extended by construction to cases not reasonably covered by its terms. It can never be assumed that incorporation will be allowed until the attention of the legislature has been given to each subject meant to be covered. The determination of the powers and conditions of corporate existence is peculiarly a matter of policy and not of law and requires legislative judgment. There are many lawful purposes for which no corporate powers have been granted, and there is much difference between the terms of such corporation laws as have been enacted.” A statute enlarging the powers of a beneficiary association takes effect without formal adoption by the association and, when after such legislation, an application for membership is accepted, it cannot be said, in the absence of any express determination on the part of the association, that it was exercising the more limited powers under the earlier statute.<sup>2</sup>

**§ 47. Corporate Powers.** — It is a well settled principle that a corporation has no other powers than such as are specifically granted; or such as are necessary for the purpose of carrying into effect the powers expressly granted.<sup>3</sup> “A corporation and an individual,” says a standard authority,<sup>4</sup> “stand upon a very different footing. The

<sup>1</sup> *Stewart v. Father Matthew Society*, 41 Mich. 67.

<sup>2</sup> *Mass. Catholic Order, etc., v. Callahan (Mass.)*, 6 N. Eng. Rep. 95; 16 N. East. Rep. 14.

<sup>3</sup> *Ang. & Ames on Corp.*, § 111.

<sup>4</sup> *Ang. & Ames on Corp.*, § 256.

latter, existing for the good of society, may do all acts, and make all contracts which are not in the eye of the law inconsistent with this great purpose of his creation; whereas, the former, having been created for a specific purpose, not only can make no contract forbidden by its charter, which is as it were, the law of its nature, but in general can make no contract which is not necessary either directly or incidentally, to enable it to answer that purpose.”

§ 48. **The Charter the Source of Corporate Powers.** — The charter, therefore, or the articles of association, is the fountain of authority for the corporation. It contains the agreement and contract on the part of the incorporators and the State which specifies the terms of association and the limits and bounds in which the associated body can act.<sup>1</sup> And it is a settled rule that a person who deals with a corporation must, at his peril, take notice of its charter or articles of association. The rule applies to both foreign and domestic corporations and rests on the necessities of the case. All persons having transactions with corporate bodies must not only notice the terms of their charters, but also all the general legislation of the State creating them, by which business with corporations is affected.<sup>2</sup> Charters of corporations and articles of association of unincorporated societies are construed like other written instruments. The object is to discover the intention of the parties, and to this end, and to carry out the objects of the organization, a liberal policy has been generally adopted.<sup>3</sup>

§ 49. **The Modern Idea of Corporations.** — The modern and most approved doctrine concerning the nature of a corporation is that it is simply a voluntary association of per-

<sup>1</sup> Morawetz on Corp., § 642 and 818, and cases cited.

<sup>2</sup> Morawetz on Corp., §§ 591, 592.

<sup>3</sup> Morawetz on Corp., §§ 316-338 inc.

sons, endowed by the law with certain special privileges, conferred by the general acts concerning corporations or the special charter, chief among which is always that of a distinct entity, by which it is known and in which the personalities of its members or stockholders are merged. Often the law goes behind this artificial entity and deals with the corporators or members as an association of individuals, or partnership. A corporation is nothing more or less than a peculiar kind of partnership. The corporate entity, as an association, or partnership, acts through and by its agents. The charter and articles of association are supposed to be known to all persons dealing with a corporation and the authority of the agents is determined by this source of authority. The laws of agency are constantly referred to in testing the validity of corporate acts. While acts in excess of corporate authority are generally void, as being what is technically known as *ultra vires*, it must always be remembered that what may be beyond the powers of a corporation under some circumstances will not be so considered under different circumstances. When a contract of a corporation has not been executed it will not be enforced specifically if in excess of corporate authority, but if executed a different rule is generally applied and the corporation is not allowed to take advantage of its own wrong. This subject of the validity of corporate acts, or *ultra vires*, is one of the most perplexing, complicated and least understood in the domain of corporate law and from the mass of conflicting decisions we cannot attempt to deduce specific rules. Of all modern writers, Mr. Morawetz has most understandingly collated the authorities and evolved the governing principles, and to his work we must refer, for, when incorporated, benefit societies are not different in law from other corporations which have no capital stock and are not formed for the pecuniary profit of their stockholders.<sup>1</sup>

<sup>1</sup> Morawetz on Corp., chap. VIII, §§ 577 to 725.

§ 50. **Exemption of Benevolent Societies from Insurance Laws.** — In a majority, if not all, of the United States, insurance companies, either home or foreign, are only allowed to do business upon compliance with specified conditions, the principal of which are the deposit with the insurance department of approved securities or money to a certain amount and the furnishing of prescribed reports and financial statements, the object being to protect policy holders by means of the security of supervision and a money deposit and incidentally to obtain revenue for the State. It would be foreign to our purpose to examine or discuss these insurance laws. In order, however, to encourage the formation of benefit societies, the advantages of which have been appreciated by legislatures, there is express provision in all the States for the organization of benevolent, charitable and educational corporations, and in many States the laws further provide that all benevolent corporations may provide in their laws for the payment upon the death of a member, to a designated person who is a relative or dependent of such member, of an agreed amount, and that such corporations shall be exempt from the general insurance laws of the State.<sup>1</sup>

§ 51. **The Status of Benefit Societies considered by the Courts.** — The courts have frequently been called upon to determine whether or not certain acting corporations were subject to the supervision of the State Insurance Departments; or required to comply with provisions of laws regulating companies doing a life insurance business; or whether the corporation was excepted as a benevolent organization within the meaning of the law. It was held by the Supreme Court of Minnesota,<sup>2</sup> that an association,

<sup>1</sup> Pub. Stat. Mass. 1882, chap. 115, §§ 8-10. Amended Stat. 1882, chap. 195, § 2; Rev. Stat. Mo. 1879, §§ 972, 973; Rev. Stat. Ohio, 1880, § 3630; Ill. Stat. 1885, chap. 32, §§ 31.

<sup>2</sup> State v. Critchett, 32 N. W. Rep. 787; following Foster v. Pray, 29 N. W. Rep. 155; and being followed in turn by State v. Trubey, 33 N. W. Rep. 554.

the purpose of which was to endow the wife of each member with a sum of money equal to as many dollars as there are members of the association, to be raised by assessments on them, was not a "benevolent society" within the meaning of the laws of that State, because "it is clear from the plan of the association," says the court, "it was not intended to bestow any benefit or help without what was thought to be an equivalent." The Supreme Court of Massachusetts early applied this rule when it declared:<sup>1</sup> "The contract made between the Connecticut Mutual Benefit Company and each of its members, by the certificates of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not excepted by the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the assured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, 'as many dollars as there are members in the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members,' and from the guaranty fund of one hundred thousand dollars, established

<sup>1</sup> Commonwealth v. Wetherbee, 105 Mass. 149.

by the corporation under its charter. This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company. The fact offered to be proved by defendant, that the object of the organization was benevolent and not speculative, has no bearing upon the nature and effect of the business conducted and the contracts made by the corporation." The same court gives this general definition: "A contract by which one party promises to make a certain payment upon the destruction or injury of something in which the other party has an interest, is a contract for insurance, whatever may be the terms of payment of the consideration, or the mode of estimating or securing payment of the sum to be insured in case of loss."<sup>1</sup> This is a leading case on the subject and has been generally followed and approved.<sup>2</sup> The St. Louis Court of Appeals in a somewhat similar case<sup>3</sup> shed additional light upon the subject by stating the difference between mutual life insurance organizations and benefit societies. It said: "If, as we think, the contract of

<sup>1</sup> *Ante*, § 50.

<sup>2</sup> *State v. Farmers, etc., Benev. Assn.*, 18 Neb. 276; 25 N. W. Rep. 81; *State ex rel., etc., v. Merchants' Exchange Benevolent, etc.*, 72 Mo. 146; *State v. Vigilant Ins. Co.*, 30 Kan. 585; *State v. Citizens' Benef. Assn.*, 6 Mo. App. 163; *Golden Rule v. People*, 118 Ill. 492; (7 West Rep. 219; 9 N. East. Rep. 342); *State v. Bankers, etc., Assn.*, 23 Kan. 499; *Bolton v. Bolton*, 73 Me. 299; *State v. Standard Life Assn.*, 38 Ohio St. 281; *Farmer v. State (Tex.)*, 7 S. W. Rep. 220.

<sup>3</sup> *State v. Citizens Benef. Assn.*, 6 Mo. App. 163.

defendant with its members is a contract of insurance, then it would appear that the main, and indeed the only, object of its existence is to do an insurance business. It is not a society bound together by any other common object, men of all races, creeds, professions and classes may belong to it; and it can in no respect be assimilated to organizations formed for religious, benevolent or literary purposes. Its one feature is life insurance; its active officers are paid; and it offers a premium for bringing in new risks. The only condition of membership is a certain condition of health and probability of duration of life. The case presented is not that of an organization whose primary object is social, literary, or benevolent, and to which a feature of mutual insurance is added for mutual aid. Such associations may exist which cannot be said to be carrying on the business of insurance, and with which we suppose it was not the intention of the legislature to interfere." The Supreme Court of Iowa, in a recent case,<sup>1</sup> in passing directly on the question whether an organization, fraternal in its nature yet affording indemnity in the nature of life insurance, was subject to the provisions of the Iowa statutes relative to life insurance companies, said: "The association has assumed the characteristics of a fraternal organization, and also of a life insurance company. The former, however, possibly predominate; for it is true, we think, that many, if not all, fraternal associations dispense in some form pecuniary benefits, and that purely life insurance companies do not have what is called secret work, a pass-word, or anything of a moral or scientific character, which in any manner affects the organization. Nor do purely fraternal organizations require that the member should be insurable. It is evident that the declared objects of the association should not alone be the controlling consideration, for they may be a mere pretense. To ascertain the primary pur-

<sup>1</sup> State v. Miller, 66 Ia. 26.



pose of this association, reference must be had to the business conducted, the manner of conducting it, and what provisions have been adopted for carrying into effect the several avowed objects of the organization. Doing this, we find that the certificate of membership provides that upon the death of each member there shall be paid to such person as he may designate the sum of \$2,000 and that thereunder he or his beneficiary is entitled to nothing more. "Elaborate and stringent provisions are made in relation to the beneficiary fund payable on the death of a member and for collecting and enforcing the payment of such amounts as are assessed on each member; but we have been unable to discover any provision for enforcing any of the other declared objects of the association stated in the preamble to the constitution of the Supreme Lodge, including 'sick benefits.' If the provisions of a fraternal character be eliminated from the association, its primary and only purpose is that of a life insurance organization.<sup>1</sup> We are satisfied, from an examination of the record, that the primary purpose of the association of the Ancient Order of United Workmen is to provide a beneficiary fund to be paid upon the death of each member, and that the avowed fraternal character of the association is merely incidental thereto. In fact, we go farther than this, and from the record find that one of two things is true; that is to say, either the fraternal objects of the association as avowed have been abandoned, or they never were intended to be enforced. We find no evidence of their enforcement, or that they ever were regarded as material by the members of the association; while, on the other hand, the provisions in relation to the beneficiary fund have been enforced, and the accumulation and payment of such fund has been regarded

<sup>1</sup> *State v. Bankers and Merchants' Mut. B. A.*, 23 Kan. 499; *Folmer's Appeal*, 87 Pa. St. 133; *Ill. Masons' B. Soc. v. Winthrop*, 85 Ill. 537; *Same v. Baldwin*, 86 Ill. 479; *State v. Cit. Ben. Assn.*, 6 Mo. App. 163; *Bolton v. Bolton*, 73 Me. 299.

as the object and purpose of the association. Therefore, it must be regarded as a life insurance organization, and within the provisions of the statute, which provides that no foreign life insurance company, aid society, or association for the insurance of the lives of its members, and doing business on the assessment plan, shall be allowed to do business in this State unless it has a guaranteed capital of not less than \$100,000 in the State in which it is organized.'''<sup>1</sup>

The Supreme Court of Texas has also considered the question whether a corporation, the Masonic Mutual Benevolent Association of Texas, organized to provide for its members during life and their families after death, and providing for the payment, to the beneficiaries of the member at his death, of a certain sum in consideration of a membership fee and certain future assessments, was an insurance company and subject to the insurance laws of the State. In its opinion the court says: <sup>2</sup> "What, then, are the purposes of the body under consideration? Its charter makes its object to provide for its members during life, and their families after death. This is apparently a benevolent object; but how is this to be accomplished? The association makes a contract with each member when he joins it, that for the consideration of a certain sum of money paid in cash, and other sums to be paid in future, which he agrees to do, that they will, ninety days after proper proof of his death, pay to certain beneficiaries a certain sum, graduated in amount, according to the length of time he lives, and, of course, according to the amount of assessments he has paid into the treasury. Before any one can enter into such a contract, he must undergo a regular examination as to his health, habits, occupation, and as to his family, and how much insurance upon his life, etc. A physician must make an examination as to his bodily condition, and ac-

<sup>1</sup> Code, § 1160.

<sup>2</sup> *Farmer v. State*, 7 S. W. Rep. 220.

cording as he is sufficiently sound and of a certain age, is he accepted into the fraternity. This contract has all the features of a life insurance policy. It is a contract by which one party, for a consideration, promises to make a certain payment of money upon the death of the other; and it is well settled that whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the insurance money, it is still a contract of insurance, no matter by what name it may be called.<sup>1</sup> It is in effect the ordinary contract made by insurance companies with the assured, differing from it in no important respect. The terms of payment are somewhat different, the amount being greater or less according as the member lives long or dies early; still it is a payment to be made at his death. The assured cannot be forced by suit to pay future premiums; but he loses his membership if he defaults in this respect. It is a common provision in insurance policies that if the assured fails to perform some of the conditions of his contract, that his policy may be cancelled, and the premiums paid shall, in that event, become forfeited to the company. The provision that membership may be forfeited for non-payment of assessments is in effect the same thing; for the assessments serve the purposes of premiums in an ordinary life policy. The examination, too, which precedes admission into membership is the same as that which occurs before the issuance of a policy, and is intended to secure the society against fraud or imposition; to prevent an unsound person from becoming insured, and to reduce its risks of loss, and increase its chances of profit. It matters not that the member was entitled to benefits in case of sickness. Insurance can be effected upon the health as well as the life of an individual. These benefits, too, are incidental to the main object of the

<sup>1</sup> Commonwealth v. Wetherbee, 105 Mass. 149; State v. Benevolent Assn., etc., 18 Neb. 281; 25 N. W. Rep. 81.

institution, and the certificates issued by it are none the less policies of insurance, though the insured derive sums of money from the contract other than those for which he has specially bargained. We are of the opinion, therefore, that the appellants constituted an insurance company within the spirit and true meaning of that term, and not an association conducted in the interest of benevolence, as contemplated by title 20 of our Revised Statutes." The Supreme Court of Kansas<sup>1</sup> has held that a contract by an association to pay at stated periods of time certain sums of money as endowments to living members, or in case of their death to pay certain other sums of money as benefits to their beneficiaries, is life insurance both as to the endowments and the benefits. The Supreme Court of Illinois,<sup>2</sup> has decided that, where a corporation establishes a relief fund, to be raised and kept up by voluntary contributions of its members, from which it agrees, upon the death of a member, to pay a sum, not exceeding a certain amount to a beneficiary named by such deceased member, and a sum not to exceed another certain amount, to the members holding certificates next in number above and below that of the deceased, and upon the death of a member, notice is given to all other members, who are expected to contribute to the relief fund, such corporation will be liable to the charge of engaging in the business of life insurance and in addition its business is illegal because in the nature of wagering. It also held that, under the Illinois act of 1872, a corporation could be organized for any lawful purpose except (among others named) that of insurance. The court said: "By the last clause of section 31 of the act, it is provided that societies intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and members who have received a per-

<sup>1</sup> *Endowment & Benev. Assn. v. State*, 35 Kan. 253.

<sup>2</sup> *Golden Rule v. Swigert*, 118 Ill. 492.

manent disability, and where no annual dues or premiums are required, and where the members shall receive no money, as profit or otherwise, except for permanent disability, shall not be deemed insurance companies. Here is the strongest implication that a society doing such a business as the pleas present, is doing an insurance business, and that it is to be deemed an insurance company. Not to be deemed an insurance company under the act, it must be intended to benefit the widows, or orphans, heirs and devisees of deceased members, and members who have received a permanent disability and where the members shall receive no money as profit or otherwise, except for permanent disability. But here the declared object is the benefit of members, and the pecuniary benefits are enjoyed, not by the widows, etc., of deceased members, and by members who have received a permanent disability, but by the appointees of deceased members, the beneficiary named in the application, and by certain of the members generally and not members who had received a permanent disability.”<sup>1</sup> In another case<sup>2</sup> it was said: “It is further objected that the contract sued on is a contract of life insurance, and *ultra vires* because expressly prohibited by the charter of the Grand Grove, and not necessary to carry into effect the objects of the corporation. The charter of the Grand Grove names as one of the main objects of the corporation, ‘aiding the families of deceased members.’ The payment of a small stipend to the helpless children of a deceased member seems to be a very reasonable way of carrying out this provision; and though the last clause of section 1 of the charter provides that the powers hereby granted shall not be used for banking or insurance purposes, it is clearly not the intent

<sup>1</sup> But in *New York (Supreme Council, etc. v. Fairman, 10 Abb. N. C. 162; 62 How. Pr. 386)* it has been held that an association formed to furnish aid to members in cases of physical disability was not an insurance company within the statute of that State.

<sup>2</sup> *Barbaro v. Occidental Lodge, 4 Mo. App. 429.*

of that provision to prohibit the payment of money by the corporation to the surviving representatives of deceased members. The corporation is not to carry on an insurance business in the usual acceptance of the term in the commercial world.”<sup>1</sup>

§ 52. Conclusion: Benefit Societies are Insurance Organizations. — It follows from the foregoing adjudications, that all benefit societies, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations whenever, in consideration of periodical contributions, they engage to pay the member, or his designated beneficiary, a benefit upon the happening of a specified contingency. Although they may also partake of the nature of clubs or fraternal societies, and although they are often technically not called insurance companies, we must admit that, whether the benefit be paid for sickness, or to provide burial, or to accumulate a fund out of which payments are to be made to beneficiaries of deceased members, the contract falls within the definition of an insurance contract, viz.: “An agreement, by which one party for a consideration (which is usually paid in money, either in one sum, or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest.”<sup>2</sup> It may be also asserted as a general principle that wherever or whenever a benefit society, paying a benefit to the beneficiaries of its deceased members, claims to be exempt from the operation of certain laws applicable to persons or companies doing a life insurance business, it can only safely base such claim upon express provisions of its charter or of the statutes exempting

<sup>1</sup> See also *Commonwealth v. National Mut. Aid Assn.*, 94 Pa. St. 481; *State v. Mut. Protective Soc.*, 26 Ohio St. 19; *White v. Madison*, 26 N. Y. 117.

<sup>2</sup> *Commonwealth v. Wetherbee*, 105 Mass. 149; *Franklin Ben. Assn. v. Commonwealth*, 10 Pa. St. 357; *ante*, § 51.

similar organizations from such liability. The association may be benevolent and charitable, and only incidentally provide benefits for its members or their beneficiaries, but nevertheless, when it contracts to pay a certain sum to the appointees of its members upon their decease, while in good standing, in consideration of certain contributions made by such members while living, it is doing a life insurance business. We shall find, as we proceed further to discuss the questions concerning the contracts and liabilities of benefit societies, that many of the principles of the law of life insurance are applied to these societies because they are in some respects simply life insurance companies doing business on a plan only partially different from that of regular life insurance organizations.

§ 53. **Exempting Statutes.** — The legislatures of most of the States have exempted certain classes of organizations from the rigid requirements of the laws applicable to regular life insurance corporations, but the reasons arise more probably from public policy than from any exceptional nature of the business transacted. These exempting statutes, while differing from each other to a great extent, are in the main alike. Any number of persons are authorized to become incorporated for benevolent, charitable, educational or social purposes and in their laws to provide for the payment to the widows, children, relatives, heirs and dependents of their deceased members of an agreed amount to be raised by assessments upon the survivors in the association. The language may be in some cases even broader and authorize such associations to pay to any one designated by the member the stipulated amount. The question is one of construction of the statutes of the several States and of individual charters and no uniform rule can be laid down that shall apply to all cases.<sup>1</sup>

<sup>1</sup> *Ante*, § 50; *Barbaro v. Occidental, etc.*, 4 Mo. App. 429; *Sup. Council v. Fairman*, 62 How. Pr. 386; 10 Abb. N. C. 162.

§ 54. **Liberality of Exemption in Certain States.**—In some States the field is practically unlimited, as in New York, where the Court of Appeals held,<sup>1</sup> that there was no restriction in the act of 1875 providing “for the incorporation of societies or clubs for certain lawful purposes,” which requires, where a society is organized under it for “mutual benefit” or “benevolent” purposes, that the benefits or benevolence be confined to members or the families of members. “There is nothing,” said the court, “in the by-laws which requires that the beneficiaries named in the certificate should be members of the family of the deceased member, and if no beneficiaries are designated the payment is to be made to his legal representatives. The power of the company to create a fund for the insurance of the lives of its members is not questioned on this appeal, and we do not, therefore, discuss it. The act of 1875 authorizes the incorporation of societies for purposes of ‘mutual benefit,’ and it must be under this head that the power is claimed, to contract for the application of the joint contributions of the members to the payment of a gross sum to the legal representatives of each member, or to such beneficiary as he may designate to receive it upon his death. “There is nothing in the act which restricts the objects of the societies formed under it to the relief of families of their members. They may be formed for general purposes of benevolence and for many other objects, such as social, political, athletic, sporting, etc. Neither does the certificate of association of the defendant restrict the application of its funds to the relief of a member or his family except where such relief is to be extended during the life of the member.” The statutes of Illinois are almost as broad. The Supreme Court of that State says:<sup>2</sup> “The first section of the act under which the defendant is organized, in express

<sup>1</sup> *Massey v. Mutual Relief Soc.*, 102 N. Y. 523.

<sup>2</sup> *Bloomington Mut. Benefit Assn. v. Blue*, 120 Ill. 121.



terms authorizes the organization of such associations for the purpose of furnishing life indemnity or pecuniary benefits to devisees or legatees. If, as is plain from the language of the statute, a person may take out a policy on his own life, and devise such policy to a stranger, what principle of public policy would be violated by a provision in the policy making it payable to a stranger, in lieu of doing the same thing by will? If the policy may be made payable to a stranger who has no insurable interest in the life of the assured, as it may be by statute, we perceive no reason which will prevent the same thing being done by a clause the insured may have inserted in the policy at the time the insurance is procured. \* \* \*

We now come to the second question. Section 1, of the act under which the defendant is incorporated, is as follows: 'That corporations, associations, or societies, for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives, by consanguinity or affinity, devisees or legatees, of deceased members, or accident or permanent disability indemnity to members thereof, and where members shall receive no money as profit, and where funds for the payment of such benefits shall be secured, in whole or in part, by assessment upon the surviving members, may be organized, subject to the conditions hereinafter provided.' It is contended that all persons not named in the act are prohibited from becoming beneficiaries. It will be observed that the contract involved is not absolutely prohibited by statute. All that can properly be claimed is, that it was not expressly authorized by the statute."<sup>1</sup>

§ 55. Limitations on Business in Certain States. — The Supreme Court of Ohio has repeatedly held,<sup>2</sup> that the

<sup>1</sup> *Lamont v. Hotel Men's Mut. Ben. Assn.*, 30 Fed. Rep. 817; *Lamont v. Iowa Legion of Honor*, 31 Fed. Rep. 177; *Maneely v. Knights Birmingham (Pa.)*, 7 Cent. Rep. 633; 9 Atl. Rep. 41.

<sup>2</sup> *State v. Mutual Protection Assn.*, etc., 26 Ohio St. 19; *State v. Cen-*

corporate powers of mutual relief associations, incorporated and organized under the statute of that State authorizing the formation of such societies "for the mutual protection and relief of their members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of such associations," are limited to the carrying into effect of the purposes thus declared. "The only beneficiaries for whom it has power to provide are the the 'families or heirs of deceased members.'" <sup>1</sup> In that State foreign benefit societies cannot do business if they issue certificates payable to other persons than those of the families or heirs of the deceased members. The court says: <sup>2</sup> "The law of comity which the relator invokes in support of his application, is fully satisfied where foreign companies are permitted to do business in this State upon the terms prescribed for domestic companies." The Massachusetts statute <sup>3</sup> provides that certain benevolent associations may "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto." In construing this statute the Supreme Court of that State <sup>4</sup> has held that associations organized under its provisions have no power to create a fund for other persons than of the classes named. <sup>5</sup>

tral Ohio Mutual Relief Assn., etc., 29 Ohio St. 399; *State v. Standard Life Assn.*, 38 Ohio St. 281; *State v. People's Ben. Assn.*, 42 Ohio St. 579; *National Mutual Aid Assn. v. Gonser*, 43 Ohio St. 1; 1 N. East. Rep. 11; 1 West. Rep. 4.

<sup>1</sup> See *post*, § 244.

<sup>2</sup> *State v. Moore*, 38 Ohio St. 7.

<sup>3</sup> Stat. 1874, chap. 375; Amended Stat. 1877, chap. 204, re-enacted Pub. Stat. 1882, chap. 115; amended 1882, ch. 175, § 2.

<sup>4</sup> *American Legion of Honor v. Perry*, 140 Mass. 580.

<sup>5</sup> *Elsley v. Odd-fellows Assn.*, 142 Mass. 224; *Mass. Catholic Order Foresters v. Callahan* (Mass.), 6 N. Eng. Rep. 95; 16 N. East. Rep. 14;

§ 56. **Life Insurance Business as now Conducted in the United States and Canada.** — As at present conducted in the United States and Canada the business of life insurance is divided between regular life insurance companies, which for a certain consideration or premium, paid at one time, annually or oftener, agree to pay a specified amount at an agreed time, or sooner in case of the death of the party insured, or simply upon the death of the assured; other companies which promise to pay a definite amount, or the proceeds of certain assessments not to exceed a certain amount, upon a specified contingency, either death, disability or expiration of a certain period, the consideration of which agreement is the promise of the assured to pay certain assessments as called by the company; and fraternal bodies organized into lodges, or sections, governed by a grand or supreme lodge, or both. All these various organizations have much in common and are all doing, either directly, or incidentally to other purposes, an insurance business; the same principles also often apply to all three classes. We shall treat of the relative dependence and government of the subordinate, grand and supreme lodges under the title “Government and Membership.”<sup>1</sup>

§ 57. **Dissolution of Voluntary Associations.** — Benefit societies, if incorporated, may be dissolved and ended by consent of the members. The existence of a voluntary association may also be terminated by implied abandonment because of failure to hold meetings for a protracted period.<sup>2</sup> It has been held<sup>3</sup> that a court will not enjoin a society from dissolving itself where a great majority of the members agree to such dissolution, notwithstanding a rule that

*Commercial League v. The People*, 90 Ill. 166; *Benefit Society v. Dugre*, 11 *Revue Legale (Queb.)* 344.

<sup>1</sup> See next chapter.

<sup>2</sup> *Strickland v. Prichard*, 37 Vt. 324; *Penfield v. Skinner*, 11 Vt. 296.

<sup>3</sup> *Waterhouse v. Murgatroyd*, 9 L. J. Ch. 272.

“if three agree to hold the society it shall not be dissolved.” A court will not, however, in these cases make mere declarations of right.<sup>1</sup> Whenever the objects of the society are impracticable, or the organization is in the nature of a fraud, it will be dissolved and the fund distributed as on the winding up of a partnership.<sup>2</sup> It is safe to assume that courts of equity will always interfere with all voluntary associations wherever necessary in the interests of their members, or society, or to prevent injustice, imposition or fraud, and will act on the same general principles invoked and practiced in partnership cases.<sup>3</sup> In like manner, wherever a trust, express or implied, is violated, equity will interfere. The general rules of equity jurisprudence and partnership apply.<sup>4</sup> It is unnecessary to enter more into detail at this place or refer to the well known works of eminent writers on the subject.<sup>5</sup>

§ 58. **Dissolution of Incorporated Societies.**—Like other corporations, benefit societies, if incorporated, may be dissolved and their existence wholly terminated by either of the following contingencies: —

*First.* By expiration of the charter.

*Second.* By dissolution and surrender of the franchises with the consent of the State.

*Third.* By legislative enactment, if no constitutional provision be violated.

*Fourth.* By forfeiture of the franchises and judgment of dissolution obtained in a proper judicial proceeding.<sup>6</sup>

The rule is laid down by the standard writers on the sub-

<sup>1</sup> Clough v. Ratcliff, 1 DeG. & Sm. 164; 16 L. J. Ch. 476.

<sup>2</sup> Beaumont v. Meredith, 3 Ves. & Bea. 181; Reeve v. Parkins, 2 Jac. & Walk. 390; Ellison v. Bignold, *Id.* 511; Pearce v. Piper, 17 Ves. 1.

<sup>3</sup> Lowry et al. v. Stotzer et al., 7 Phila. 397; Toram v. Howard Assn., 4 Barr, 519.

<sup>4</sup> Gorman v. Russell, 14 Cal. 531.

<sup>5</sup> See *ante*, § 39.

<sup>6</sup> Morawetz on Corp., § 1004.

ject that there is a broad and fundamental distinction between the dissolution of a corporation and the loss of its franchise or legal right to exist. An association may still be a corporation *de facto* though not *de jure* and *vice versa*.<sup>1</sup>

· § 59. **When Equity will Interfere.** — Upon sufficient cause shown a court of equity will always interfere to prevent a misuse of corporate franchises or abuse of the rights of members and will wind up the association if it is manifest that it cannot accomplish the purposes of its organization. The comprehensive and flexible rules of equitable jurisprudence apply to all kinds of corporations and courts of equity are always open to those who are wronged or aggrieved by the tortious acts or the mismanagement of the officers or members of these associations. In a recent case<sup>2</sup> the Supreme Court of Michigan said: "Although a court of equity may not decree a dissolution of the corporation, yet, in virtue of its general jurisdiction over trusts, and to afford remedies in cases where courts of law are inadequate to grant relief, it has jurisdiction to grant relief against a corporation upon the same terms it might against an individual under similar circumstances."<sup>3</sup> And a corporation which by its articles of association is to continue a certain number of years cannot dissolve itself until that period has expired unless all the shareholders consent.<sup>4</sup>

§ 60. **Forfeiture of Corporate Franchises.** — Only the State can claim the forfeiture of corporate franchises for

<sup>1</sup> Morawetz on Corp., § 1002.

<sup>2</sup> Stamm v. Northwestern Mutual Benefit Assn., 8 West. Rep. 771; 32 N. W. Rep. 710.

<sup>3</sup> Cramer v. Bird, L. R. 6 Eq. 143; Re Suburban Hotel Co., L. R. 2 Ch. App. 737-743-750; Marr v. Union Bank, 4 Coldw. 484; Bradt v. Benedict, 17 N. Y. 93; Slee v. Bloom, 19 Johns. 456; 10 Am. Dec. 273.

<sup>4</sup> Barton v. Enterprise B. & L. Assn. (Ind.), 13 West. Rep. 816; 16 N. East. Rep. 486; Von Schmidt v. Huntington, 1 Cal. 55, 73,

wrongful acts of omission or commission.<sup>1</sup> The Supreme Court of California<sup>2</sup> has thus laid down the general rule: "There is a broad and obvious distinction between such acts as are declared necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made prerequisites to the assumption of corporate powers. In respect to the former any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the corporation is responsible only to the government, and in a direct proceeding to forfeit its charter."<sup>3</sup>

<sup>1</sup> Morawetz on Corp., § 1015.

<sup>2</sup> Mokelumne Mining Co. v. Woodbury, 14 Cal. 424, 426; 23 Am. Dec. 658.

<sup>3</sup> Morawetz on Corp., § 31, and cases cited.

## CHAPTER III.

### GOVERNMENT AND MEMBERSHIP: BY-LAWS.

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## § 61 GOVERNMENT AND MEMBERSHIP: BY-LAWS.

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§ 61. **Plan of Organization of Benefit Societies.**—A majority of benefit societies are fraternal and social in their organization and have secret meetings and rituals. Frequently the organization is composed of several distinct, but not entirely disconnected, judicatories or assemblies. The subordinate lodges or associations, most numerous, are first; above these are State, or district, societies, or grand lodges, made up of representatives from the local lodges, and over all is sometimes a supreme or national, governing body, composed of delegates from the State or



district grand lodges. These various organizations are sometimes incorporated, often mere voluntary associations, and frequently the subordinate lodges or grand lodges are corporations while the governing authority, to which they acknowledge subjection, is a voluntary association. This complex situation gives rise to different rules applicable to the varying circumstances and at times renders it difficult to apply the proper legal principles to the various cases.<sup>1</sup>

§ 61a. **Element of Property Rights of Members.**—The law under some circumstances distinguishes between the societies which are incorporated and those that are mere voluntary associations, and again between questions involving the property rights of members and those concerning discipline only or policy of government. In regard to the latter the Supreme Court of Indiana<sup>2</sup> has said: “Claims for money due by virtue of an agreement are unlike mere matters of discipline, questions of doctrine, or of policy, and are not governed by the same rules. \* \* \* One who asserts a claim to money due on a contract, occupies an essentially different position from one who presents a question of discipline, of policy, or of doctrine of the order or fraternity to which he belongs.” Questions of discipline of members where the membership involves, or has connected with it property rights, are differently regarded from disputes concerning membership in mere social clubs when such membership has no element of property connected with it. These differences will appear as the subject is further discussed.<sup>3</sup>

§ 62. **Common Characteristics of Corporations and Voluntary Associations.**—Remembering that a corporation is simply a voluntary association of persons for an

<sup>1</sup> *Ante*, § 11.

<sup>2</sup> *Bauer v. Sampson Lodge, etc.*, 102 Ind. 202.

<sup>3</sup> *Post*, §§ 105, 106, 107, 108.

agreed and lawful purpose, endowed by the State with an imaginary entity or individuality, and also that "the real nature of a corporation, in every case, depends upon the charter under which it is formed and must be determined by reference thereto,"<sup>1</sup> it follows that voluntary associations of all kinds, whether partnerships, charities, corporations or mere clubs or societies, have many characteristics and rules in common, the principal of which is that all rights of the members and their powers, as well as of the association or corporation, are derived from the original compact between them which is contained in the articles of association or charter.<sup>2</sup>

**§ 63. Membership Governed by Articles of Association or Charter.**—The articles of association, or charter, regulate the admission of members of societies and define their qualifications. The rule is applicable to all associations, incorporated or voluntary, and if wrongfully admitted the member can be expelled. The Supreme Court of Pennsylvania<sup>3</sup> has said: "It is true the power of admitting new members being incidental to a corporation aggregate, it is not necessary that such power be expressly conferred by the statute. Yet when the statute does limit and restrict the power, it erects a barrier beyond which no by-laws can pass." Where the statute required all practicing physicians to become members of the county medical society, and a physician so applying was rejected because of alleged unprofessional acts in violation of the society's by-laws, the New York Court of Appeals held<sup>4</sup> that the code of medical ethics adopted by such a society was binding on members alone and its non-observance previous to membership fur-

<sup>1</sup> Morawetz on Corp., §§ 6, 7, 316, 580.

<sup>2</sup> Leech v. Harris, 2 Brewst. 571; Commonwealth v. St. Patrick's Soc., 2 Binn 441; 4 Am. Dec. 453; *post*, § 69.

<sup>3</sup> Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

<sup>4</sup> People v. Erie Medical Society, 32 N. Y. 187.

nishes no legal cause for either exclusion or expulsion. But in this case the party excluded had a clear presumptive title for admission to the exercise of a corporate franchise.<sup>1</sup>

§ 64. **Majority can Bind Minority.**—Another fundamental rule applicable to all associations, partnerships and corporations is that, within the express or implied terms of the charter or partnership agreement, the majority has power to bind the entire membership.<sup>2</sup> The rule laid down in regard to partnerships and companies by Lindley,<sup>3</sup> is: “A corporation acts by a majority; the will of the majority is the will of the corporation; and whatever it is competent for the corporation to do can be done by a majority of its members against the will of the minority. \* \* \* It appears: (1.) That within the limits set by the original constitution of a partnership or company, the voice of a majority must prevail. (2.) That it is not competent for any number of partners or shareholders, less than all, to pass beyond those limits. (3.) That it is competent for all to do so, unless they are bound together not only by agreement amongst themselves, but by some charter, letters-patent, or act of parliament.” The general rule is also thus expressed: “The fundamental principle of every association for self-government is, that no one shall be bound except with his own consent, expressed by himself or his representatives; but actual assent is immaterial, the assent of the majority being the assent of all; for this is not only constructively true, but actually true; for that the will of the majority shall in all cases be taken as the will of the whole, is an implied, but essential stipulation in all associations of this sort.”<sup>4</sup>

<sup>1</sup> *Ex parte Paine*, 1 Hill, 666; *People v. Medical Society of Erie*, 24 Barb. 577; *Fawcett v. Charles*, 13 Wend. 473; *Bagg's Case*, 11 Coke, 99.

<sup>2</sup> Morawetz on Corp., § 641.

<sup>3</sup> 2 Lindley on Part. 608.

<sup>4</sup> *In re St. Mary's Church*, 7 Serg. & R. 517; *New Orleans v. Harris*, 27 Miss. 537; Morawetz on Corp., §§ 641 and 474.

§ 65. **Limitations on Action of Majority.** — The majority in order to bind the minority by its acts must comply with every formality which is prescribed by the company's, or association's, charter or articles of association, or by custom; must act within the objects of the articles of association or charter, and is bound in all transactions to the utmost fairness and good faith to the minority.<sup>1</sup>

§ 66. **Must Act at Properly Called Meeting.** — The majority can act only at a meeting called together in a proper manner. It is essential that every member be notified of a meeting before it is held. If notice to any one was omitted, those present at the meeting have no authority to act for the whole body of members, and the transactions at the meeting will not be binding as corporate acts. If the charter or by-laws of an association or company fix the time and place at which regular meetings shall be held, this is itself sufficient notice to all the members and no further notice is necessary. Every reasonable presumption is made in favor of the regularity of all meetings and the giving of proper notice will be presumed until the contrary appears.<sup>2</sup>

§ 67. **Meetings of Association or Corporation, Notice of.** — Meetings of the members of an association or corporation are not binding unless called by competent authority, or unless all the members entitled to vote are present. If the by-laws or articles of association prescribe by whom meetings shall be called, these requirements must be observed and if the officers wrongfully refuse to call a meeting they may generally be compelled to do their duty by *mandamus* proceedings. A distinction is made between regular and special meetings. The former are those that are held at stated times according to the charter or rules of the asso-

<sup>1</sup> State v. Ancker, 2 Rich. (S. C.) 245; Morawetz on Corp., §§ 475 and 477.

<sup>2</sup> Morawetz on Corp., § 479 and note; Sargent v. Webster, 13 Metc. 497.

ciation, while the latter are called at irregular or unusual times under authority given by the charter or laws of the association. Notice of a meeting of the members of an association or corporation must be given in the manner prescribed by the charter, if no way is laid down then such notice must fix the exact time and place of the meeting and generally indicate the nature of the business to be transacted.<sup>1</sup> "The time of meeting must be stated precisely; if a meeting is called to order, and business is transacted before the time set, the proceedings will not be valid. If the time of meeting is prescribed by the charter or a by-law, that is sufficient notice; and it has been held, that, if the time of meeting has been fixed by usage, or the tacit consent of the members or shareholders, no other notice is required. The meeting should be opened within a reasonable time after the hour indicated in the notice. The place of meeting must also be fixed. And if a meeting is held at a different place from that prescribed, it will not be valid. In case of an extraordinary or special meeting, the notice must indicate the nature of the business to be brought before it; but this is not necessary in case of a regular meeting for the transaction of ordinary business. The notice must be served upon each shareholder in person unless otherwise provided by the charter or a by-law and if the charter does not prescribe how long before a meeting notice must be served, a reasonable time is required."<sup>2</sup> It seems that meetings of a beneficiary society may lawfully be held on Sunday.<sup>3</sup>

§ 68. Jurisdiction of Grand and Supreme Lodges. — The jurisdiction of Supreme and Grand lodges over those

<sup>1</sup> *St. Mary's Ben. Assn. v. Lynch* (N. H.), 9 Atl. Rep. 98; 4 N. Eng. Rep. 163.

<sup>2</sup> *Morawetz on Corp.*, §§ 473 to 483.

<sup>3</sup> *McCabe v. Father Matthew, etc.*, 24 Hun, 149; *Robinson v. Yates City Lodge*, 86 Ill. 598.

that are subordinate is in many respects analogous to that of certain ecclesiastical bodies over the churches in a certain territory. Upon this subject the Supreme Court of the United States has said: <sup>1</sup> “The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine and to create tribunals for the decision of controverted questions of faith within the association and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.” <sup>2</sup> The preponderance of authority is in favor of the doctrine that as to all questions of policy, discipline, internal government and custom the legal tribunals must accept as binding the decision of the regularly constituted judicatories of the church, fraternity, association or society. The rule is different when property rights are involved. In such cases the civil courts are strict in asserting their powers.

**§ 69. Articles of Association, or Constitution and By-laws, Regulate Rights and Powers of Officers and Members.** — The rights and powers of the officers and members of the associations or lodges, superior or subordinate, are

<sup>1</sup> *Watson v. Jones*, 13 Wall. 679.

<sup>2</sup> This opinion reviews all the cases bearing on the subject, but they are here omitted because they relate to ecclesiastical organizations only.

regulated by their articles of associations, or constitution and by-laws, which constitute the contract of the members with each other and by the provisions of which they undertake to be bound.<sup>1</sup> In all cases of dispute as to rights or duties of the various bodies, their officers or members, the original compact is the measure by which a decision is to be reached.<sup>2</sup> The opinions of the officers of the society, or its custom and usage in respect to the interpretation of terms used in the contract, are not admissible evidence in actions on the contract if the language used be not ambiguous.<sup>3</sup>

§ 70. **An Early Masonic Case.**—One of the earliest cases involving the rights of grand and subordinate lodges in respect to each other and the property of either was that of *Smith et al. v. Smith et al.* in 1813.<sup>4</sup> It involved the right to a certain fund belonging to the incorporated Grand Lodge of Ancient York Masons and was brought by the plaintiffs in behalf of a voluntary association claiming to be the successor of the corporation under the name of Grand Lodge of South Carolina. Incidentally the distinction between certain Masonic bodies and doctrines was discussed. The general rule laid down was that the Grand Lodge of Freemasons cannot make new regulations subversive of fundamental principles and landmarks without the clear consent of the subordinate lodges; nor can the officers of a corporation composed of several integral parts, dissolve the corporation without the full assent of the great body of the

<sup>1</sup> *Ante*, § 62.

<sup>2</sup> *Lowry v. Stotzer*, 7 Phila. 397; *Austin v. Searing*, 16 N. Y. 112; *Chamberlain v. Lincoln*, 129 Mass. 70; *Leech v. Harris*, 2 Brews. 587; *Grosvenor v. United Society, etc.*, 118 Mass. 78; *White v. Brownell*, 3 Abb. Pr. (N. S.) 318.

<sup>3</sup> *Manson v. Grand Lodge*, 30 Minn. 509; *Davidson v. Knights of Pythias*, 22 Mo. App. 263; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122.

<sup>4</sup> 3 Dessau. 557.

society. The dereliction of the charter by the heads of a corporation does not dissolve the corporate body, especially if the remaining members have the power of renovating the head. The seceding members of a chartered society, forming a new voluntary association, cannot sustain a suit for the recovery of debts due to the corporation.<sup>1</sup>

§ 71. **The Odd-fellows' Case, *Austin v. Searing*: Power of Grand Lodge of Voluntary Association over Subordinate Lodges.** — The Court of Appeals of New York was early called upon to determine rights under the complex organization of the Odd-fellows' fraternity, where all the constituent bodies were unincorporated. In that case<sup>2</sup> Judge Selden said: "The complaint, upon which the questions in this case arise, sets out what appears to be a regular governmental organization, with its constitution and laws, and powers legislative and judicial. The head of this organization is a congress of representatives, called the Grand Lodge of the United States, which not only legislates for all lodges in the several States, but also exercises judicial powers over them, for the complaint states that the grand lodges of the several States are subject at all times to the resolves, orders and decrees of the congress of representatives and are amenable to its constitutional authority. The grand lodges of the several States and districts exercise similar powers. They grant, revoke and renew charters, make by-laws, and pass judicially upon charges presented against subordinate lodges, expelling or reinstating them at pleasure. These powers extend to the confiscation of the entire property of a subordinate lodge,

<sup>1</sup> *Goodman v. Jedidjah Lodge, etc.* (Md.), 8 Cent. Rep. 278; 9 Atl. 13; *District Grand Lodge v. Jedidjah Lodge*, 65 Md. 236; *Court Mount Royal v. Boulton, Q. B. (Quebec)* 1881; cited 2 Stephen's Digest 106. But see *Altman v. Benz*, 27 N. J. Eq. 331.

<sup>2</sup> *Austin v. Searing*, 16 N. Y. 112; s. c. 69 Am. Dec. 665, where valuable note is appended.



whenever, in the opinion of the grand lodge, upon a case brought regularly before it, it shall satisfactorily appear that such subordinate lodge is guilty of insubordination. Now, all this is very well, so long as the lodges neither violate nor ask any aid from the laws; but it may, with propriety, be doubted whether the judicial power of the State is to be invoked to uphold and enforce the decrees of these self-constituted judicatories. It is to be remarked that these lodges are charitable institutions, whose objects commend them extensively to public favor, and, that there are nearly four hundred of them in northern New York alone, and, being purely voluntary associations, there is, of course, no limit to the amount of property which they may acquire. If this suit can be maintained, then all this property, however vast, is ultimately controlled, not by any power within the State, but by the Grand Lodge of the United States; for, by the constitution of these lodges, as given in the complaint, it will be seen that on the expulsion of any subordinate lodge (which is a matter resting entirely in the will of the grand lodge of the State or district), the whole property of the lodge expelled is, *ipso facto*, vested in the grand lodge, which is under no obligation to reinstate the lodge or restore the property; and, as the grand lodge of the State is bound to obey the decrees of the national lodge, the whole property is thus brought under the control of the latter. This is entirely unobjectionable, so long as submission to these decrees is merely voluntary; but the question is whether that submission is to be legally and judicially enforced. Let us see what a chancellor of England said about a case very similar to this. I refer to the case of *Lloyd v. Loaring*.<sup>1</sup> That was a bill filed by Evan Lloyd and two other persons, to get possession of the dresses, decorations, books, papers, etc., of a lodge of Freemasons, called the Caledonia Chapter, No. 2. The plaintiff stated

<sup>1</sup> 6 Ves. 773.

that this lodge was regularly organized under a charter from the grand or head chapter of Royal Arch Masons; that they were its chief officers, and as such were entitled, by virtue of the rules of the society, to the charge and custody of the property, etc., which the defendants had forcibly removed. The defendants demurred there, as here, to the bill. The opinion of Lord Chancellor Eldon, in that case, is so precisely applicable to this that I will make one or two extracts from it. He said: 'A bill might be filed for a chattel, the plaintiffs stating themselves to be jointly interested in it with several other persons; but it would be very dangerous to take notice of them as a society having any thing of a constitution in it. In this bill there is a great affectation of a corporate character. They speak of their laws and constitution, and the original charter by which they were constituted. In *Cullen v. The Duke of Queensbury*,<sup>1</sup> Lord Thurlow said he would convince the parties that they had no laws and constitution.' And again: 'That this court will hold jurisdiction to have a chattel delivered up, I have no doubt; but I am alarmed at the notion that these voluntary societies are to be permitted to state all their laws, forms and constitutions upon the record, and then to tell the court they are individuals, etc. The bill states that they subsist under a charter granted by persons who are now dead; and, therefore, if this charter cannot be produced, the society is gone. Upon principles of policy, the courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters.' This appears to me to be apt and sensible language in the case in which it was used, where the charter, constitution, etc., were barely referred to; but with what increased force does it apply to the case before us, in which we have spread upon the record two formal constitutions, one of which contains fifteen distinct articles, the other eleven, each article being

<sup>1</sup> 1 Bro. C. C. 101.

subdivided into a variety of sections, and altogether embracing a complete system of governmental polity. There is, however, no objection to all this, provided we apply to these articles the same rules as to ordinary agreements *inter partes*, and give to them no peculiar force as the constitution and laws of an organized body. Admitting then the action to be well brought, in the name of the treasurer, under the act of April 7, 1849, about which I will not stop to inquire, it is clear that the plaintiff can only recover by showing either a legal or equitable title to the property in question in the lodge which he represents, that is in the associated members of that lodge. How does he show this? It is conceded by the complaint that the property originally belonged to the lodge expelled, of which the defendants were members. The defendants, therefore, were tenants in common, with the plaintiff and his associates, of the property, and had an equal right with them to its custody. It is incumbent on the plaintiff to show a legal transfer of this title. This he assumes to do by showing the expulsion by the grand lodge of the old Cayuga lodge, and the restoration of the new. The effect is supposed to be wrought through the operation of the constitutions of the two lodges. But it is obvious that these constitutions can have no binding force whatever, except what they derive from the assent of each individual member. That is, any member to be bound by them, must have personally assented to their provisions. It is only as contracts that these constitutions are in the least obligatory. The counsel for the plaintiff takes this view of the case in his printed argument. He says: 'The court is sitting to judge between individuals as to rights acquired by the contracts between them. It is immaterial whether such contracts are made in the form of subscriptions to general constitutions and by-laws, or to separate articles of agreement.' Viewed then, as contracts, these constitutions must be subject to the same rules with

all other contracts. It must be clearly shown that the defendants have assented to the written constitutions of these lodges. The complaint avers that the members of the present Cayuga lodge, 'have each and every one of them, in conformity with the usages and requirements of the order, subscribed to an article of association, denominated a constitution, a copy of which is hereunto annexed,' etc. There is also a general averment that the grand lodges in the several States have constitutions to which their members are obligated to subscribe, and do subscribe, and that one of these grand lodges is denominated the Grand Lodge of Northern New York, and that this lodge has public and printed articles of association, styled a constitution, a copy of which is thereunto annexed. But there is no averment that this constitution was ever in fact subscribed by anybody, nor does the complaint contain any direct averment that the defendants ever subscribed the constitution of any lodge, either grand or subordinate. The averment relied upon by the plaintiff upon the subject is this: after stating the existence of the original Cayuga lodge, and that the plaintiff and his associates and the defendants were all members of that lodge, the complaint proceeds thus: 'that, as such members and associates, they had, each and every one of them, covenanted with each other to observe, obey, conform to and abide by the constitution, by-laws, rules and regulations of the said lodge, and of said Grand Lodge of Northern New York.' Covenanted? How? Under their hands and seals? It is not so averred. There is neither profert nor offer to produce the covenant. Will this do in a legal pleading? I apprehend not. It is altogether too vague. Again what constitution did they covenant to observe? The averment says: 'The constitution, by-laws, etc., of the Cayuga lodge, and of said Grand Lodge of Northern New York, but does not set forth the constitutions in this

connection, nor give any reference by which they can be identified or their provisions ascertained. We may conjecture that the plaintiff means the same constitutions which are referred to elsewhere in the complaint, but it is not so averred. If we look at the whole complaint, we shall see that it is not intended to be averred that the defendants ever subscribed the constitution of the grand lodge itself. It is difficult to see, therefore, how the provisions of that instrument are to be made obligatory on the defendants as a contract. There is nothing in the constitution of the expelled lodge (which probably was subscribed by the defendants, although that is not in terms averred) which adopts the constitution of the grand lodge. It is this latter constitution alone which confers the power by which the property in question is claimed to have been transferred. But were it distinctly averred that the defendants had subscribed the constitution of the grand as well as of the subordinate lodge, I should still be of the opinion that public policy would not admit of parties binding themselves by such engagements. The effect of some of the provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection or control of the parties upon whose rights they sit in judgment. To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit, confers no power upon the arbitrator; and even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert

bias or prejudice on the part of the arbitrator chosen. It would hardly accord with this scrupulous care to secure fairness, in such cases, that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation." In the same case in a concurring opinion Judge Brown said: "The by-laws and regulations of these voluntary associations may be all very well in their place and sphere and may command generally the obedience and submission of those upon whom they are designed to act; they cannot, however, have the force of law, nor impair or affect the rights of property against the will of its real owners. So long as the members of these bodies yield their assent or concurrence, it is all very well; the law interposes no obstacle or objection. But when orders and decrees of the character of those referred to, are resisted, and the owners of property refuse to be deprived of it, then it will be found that property has rights, and the courts of justice have duties, of which the plaintiff in this action has an indifferent conception. The courts of justice cannot be called upon to aid in enforcing the decrees of these self-created judicatories. The confiscation and forfeiture of property is an act of sovereign power; and the aid of this or any other court will not be rendered to enforce such proceedings, or to recognize legal, or supposed legal, rights founded upon them." <sup>1</sup>

§ 72. **Other Cases Involving Same Question: the Element of Incorporation.** — In a somewhat similar case in Maryland the Court of Appeals held<sup>2</sup> that, when the charter granted by the State to a lodge is still in force, the lodge has the right to hold its substantial property or pecuniary rights

<sup>1</sup> In *Bauer v. Sampson Lodge, etc.*, 102 Ind. 262, this case of *Austin v. Searing* was cited and approved; see *post*, § 72.

<sup>2</sup> *Goodman v. Jedidjah Lodge, etc.*, 8 Cent. Rep. 278; 9 Atl. Rep. 13.

under the corporate powers conferred by that charter, unaffected by the forfeiture of its conventional charter by the grand lodge. That "whatever powers the higher lodges in such an organization as this may have to make rules or laws for the government of the subordinate lodges and the discipline of their members, we think it is quite certain that the courts can never recognize as valid any rule or law so made, the effect of which is to confiscate property, or to arbitrarily take away property rights from one set of members and give them to another set; nor will the courts allow or recognize the enforcement of any such rule when its enforcement will accomplish and is designed to accomplish such a result." In Michigan, in a case involving the right of an incorporated grand lodge to suspend a member for not paying an assessment ordered by the supreme lodge, superior in authority but incorporated in a different State, the Supreme Court said: <sup>1</sup> "The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself or its members to a foreign authority in this way. There is no law of the State permitting it, nor could there be any law of this State which would subject a corporation created and existing under the laws of this State to the jurisdiction and control of a body existing in another State and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being."<sup>2</sup> But in New Jersey the Court of Chancery held<sup>3</sup> that, where certain members of a subordinate lodge of the order withdrew from the jurisdiction of the grand lodge of the State and surrendered their charter, forming a new lodge under the same name, and the minority of the members continued steadfast

<sup>1</sup> *Lamphere v. Grand Lodge*, 47 Mich. 429.

<sup>2</sup> *State ex rel., etc. v. Miller et al.*, 66 Ia. 26; *Grand Lodge v. Stepp*, 14 Pittsb. Leg. J. 164; 3 Penny. 45; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Allnutt v. High Court of Foresters (Mich.)*, 28 N. W. Rep. 802.

<sup>3</sup> *Altmann v. Benz et al.*, 27 N. J. Eq. 331.

in their allegiance and the surrendered charter was redelivered to them as the lodge, the body which continued true in its allegiance was entitled to the property of the society and was the true original lodge. In this case the analogy to religious associations was clearly considered, for the court refers to a decision of its own in a church dispute.<sup>1</sup> And in a case in Missouri,<sup>2</sup> it was held that an incorporated lodge of Odd-fellows has the right, through its proper officers and in accordance with its established rules, to determine who are not members thereof, and the courts will leave that question to be determined by the lodge itself, through the judicial action of its proper officers, regardless of whether the charter of the lodge in which membership is claimed gives, in express terms, such power to these officers. But in this case no property right was involved. The subordinate lodge, whose charter had been arrested and then restored, had, in voting for the members to whom such charter was to be restored, excluded the plaintiffs, who sought to be reinstated by *mandamus*. The court places its decision on the ground of the assent of relators to what was done, and their further consent that they should have no vested right in what was called the property of the lodge. In this case also the analogy of fraternal societies to religious associations was admitted.<sup>3</sup>

**§ 73. Distinction between Social Organizations and those Furnishing Insurance Indemnity.** — Late decisions show an inclination to distinguish between purely social or benevolent organizations and those which provide for a benefit in the nature of life insurance, and the cases quoted from <sup>4</sup> expressly declare that if such organizations “choose

<sup>1</sup> *Hendrickson v. Shotwell*, 1 N. J. Eq. 577; *Yeates v. Roberts*, 3 Drew, 170; 1 Jur. (N. s.) 319; *affd.* 7 DeG. M. & G. 227.

<sup>2</sup> *State v. Odd-fellows' Grand Lodge*, 8 Mo. App. 148.

<sup>3</sup> See *post*, § 76.

<sup>4</sup> *Goodman v. Jedidjah Lodge, etc.* (Md.), 8 Cent. R. 278; 9 Atl. Rep.



to go into that kind of business, they must expect courts will deal with and adjudicate the rights of the policy holders, upon the same principles of equity and justice that they apply in the usual and ordinary cases of life insurance contracts.”<sup>1</sup> The further distinction is made, when the subordinate organization is incorporated, that “a cause of forfeiture cannot be taken advantage of or enforced against a corporation collaterally, or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation; and the government creating the corporation can alone institute the proceeding; and it can waive a forfeiture, and this it can do expressly, or by legislative acts recognizing the continued existence of the corporation.”<sup>2</sup>

§ 74. **Supreme, Grand and Subordinate Lodges a Single Organization.** — The various lodges, subordinate, superior and supreme, form, so far as most rights are concerned, but one organization, or society, although each individual lodge or association has its own individuality and distinctive rights and liabilities.<sup>3</sup> A subordinate organization may often have a dual existence; first, as a corporation under the laws of the State of its residence, and second under its conventional charter granted by its fraternal or agreed superior body, and either of these charters may be lost, sur-

13; *District Grand Lodge, etc., v. Jedidjah Lodge*, 65 Md. 236; *Supreme Council, etc., v. Garrigus*, 104 Ind. 133; *State v. Miller*, 66 Ia. 26; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Mulroy v. Sup. L. Knights of Honor*, 28 Mo. App. 463; *Lamphere v. Grand Lodge*, 47 Mich. 429; *Alnutt v. High Court of Foresters*, 28 N. W. Rep. 802.

<sup>1</sup> *Goodman v. Jedidjah Lodge, etc. (Md.)*, 8 Cent. Rep. 278; 9 Atl. Rep. 13.

<sup>2</sup> *In re N. Y. Elevated R. R. Co.*, 70 N. Y. 337; *Morawetz on Corp.*, § 1015.

<sup>3</sup> *Watson v. Jones*, 13 Wall. 679; *Smith v. Smith*, 3 Dessau. 557; *Austin v. Searing*, 16 N. Y. 113; *Poultney v. Bachmann*, 62 How. Pr. 406; *Lafond v. Deems*, 81 N. Y. 507.

rendered or forfeited without affecting the other.<sup>1</sup> In a recent case<sup>2</sup> where the incorporated supreme governing body had issued an obligation to a member of one of the inferior, or subordinate, associations and the claim was made that such member was not a member of the corporation because it was made up of representatives from the grand lodge, which in turn was composed of representatives from the subordinate lodges, of one of which the obligee was a member, the court said: "There is, it must be admitted, a certain confusion resulting from the fact that the Supreme Council is sometimes treated in the certificate of incorporation, constitution and by-laws, as the corporation, and sometimes as only its governing body who directs its operations. It is to the body acting in the latter capacity, that the article in question refers. The section quoted contemplates distinctly, by the use of terms referring to them, that there are other members of the order. An examination of the whole system will show that the association was established, among other things, for the purpose of affording mutual aid to its members, and also for the purpose of establishing what was termed a widows' and orphans' benefit fund, for the payment of specific sums to the widows, orphans, and other dependents of deceased members. It transacted its business mainly through the agency of grand councils composed from the subordinate councils in each State, and through the agency of their subordinate councils; both of which councils operated under charters granted by the supreme council, and in accordance with rules prescribed in such charters. As Robinson became a member of a subordinate council, he was entitled to a voice in its representation in the supreme council as the governing body. When, in

<sup>1</sup> *Goodman v. Jedidjah Lodge (Md.)*, 8 Cent. Rep. 279; 9 Atl. Rep. 13; *Mason v. Finch*, 28 Mich. 282; *Smith v. Smith*, 3 Dessau. 557; *State v. Miller*, 66 Iowa, 26; *Morawetz on Corp.*, § 1002.

<sup>2</sup> *Saunders v. Robinson*, 144 Mass. 306; 10 N. E. Rep. 815; 4 N. Eng. Rep. 171.

the certificate of incorporation, members of the Supreme Council of the Royal Arcanum are referred to as those for whose benefit the association is intended, those who constitute the body which administers its affairs are not alone included, but all who, through the subordinate councils, become members of the organization, or order, as it is termed."<sup>1</sup> As a general rule, the constitutions and by-laws of grand and supreme lodges of the various orders or societies are binding upon the members of subordinate lodges, because by reference and adoption they are made parts of the laws of the subordinate bodies,<sup>2</sup> and this too, whether they are incorporated or not, except possibly, when a property right is involved.<sup>3</sup>

§ 75. **Rights of Minority.** — It has been held,<sup>3</sup> that, before the aid of the civil courts can be invoked by agreed members of a society, they must have exhausted the remedies prescribed by the constitution and laws of such society and its superior governing bodies. A minority of an unincorporated society, formed for social and benevolent purposes, cannot maintain an action to have the property divided or sold, or to compel the majority to purchase their interest, while the property is being used for the purposes for which it was procured, although occupied or used by a different lodge.<sup>4</sup> But a minority can generally insist upon a carrying out of the purposes of the society, at least so far as prop-

<sup>1</sup> *Schen v. Grand Lodge, etc.*, 17 Fed. Rep. 214.

<sup>2</sup> *Chamberlain v. Lincoln*, 129 Mass. 70; *Altmann v. Benz*, 27 N. J. Eq. 331; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Hall v. Supreme Lodge*, 24 Fed. Rep. 450.

<sup>3</sup> *Oliver v. Hopkins*, 144 Mass. 175; 4 N. Eng. Rep. 796; 10 N. East. Rep. 776. See also *Chamberlain v. Lincoln*, 129 Mass. 70; *Grosvenor v. Society, etc.*, 118 Mass. 78.

<sup>4</sup> *Robbins v. Waldo Lodge*, 78 Me. 565; 7 Atl. Rep. 540; 4 N. Eng. Rep. 398; *Hinkley v. Blethen*, 78 Me. 221; 3 Atl. Rep. 655; 1 N. Eng. Rep. 794.

erty is concerned;<sup>1</sup> the provisions of the articles of association must govern.<sup>2</sup>

§ 76. *Analogy between Lodges and Churches.* — It is not unreasonable to expect that in future, as in past, adjudications the courts will to a greater or less extent adopt as applicable to fraternal, social, benevolent or benefit societies the rules laid down and now well settled by a long line of decisions in the United States, governing ecclesiastical organizations, subject to the qualifications already established concerning attempts to forfeit the rights of one class of members and transfer them to another, and the forfeiture of the property rights of members.<sup>3</sup> These rules have been declared by the Supreme Court of the United States<sup>4</sup> substantially as follows:—

§ 77. *Property Rights of Religious Societies; how Determined.* — Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions: (1.) Was the property or fund which is in question devoted by the express terms of the gift, grant, or sale by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society, for religious purposes, with no other limitation. (2.) Is the society which owned it of the strictly congregational or independent form of church government, owing no submission to any organization outside of the congregation? (3.) Or is it one of a number of such societies, united to form a more general body of

<sup>1</sup> Mann v. Butler, 2 Barb. Ch. 362; Torrey v. Baker, 1 Allen, 120.

<sup>2</sup> Penfield v. Skinner, 11 Vt. 296; St. Mary's Ben. Assn. v. Lynch, (N. H.), 9 Atl. Rep. 98; 4 N. Eng. Rep. 163.

<sup>3</sup> State v. Odd-fellows', etc., 8 Mo. App. 148.

<sup>4</sup> Watson v. Jones, 13 Wall. 679.

churches, with ecclesiastical control in the general association over the members and societies of which it is composed? In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust. If the property was acquired in the ordinary way of purchase or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property. In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society, as by its own rules constitute its government. In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization, with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government. In such cases, where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.<sup>1</sup>

<sup>1</sup> Opinion cites: *Miller v. Gable*, 2 Denio, 492; *Shannon v. Frost*, 3 B. Mon. 253; *Smith v. Nelson*, 18 Vt. 511; *Gibson v. Armstrong*, 7 B. Mon. 481; *Harmon v. Dreher*, 1 Speer's Eq. 87; *Watson v. Avery*, 2 Bush, 332; *John's Island Church Case*, 2 Rich. Eq. 215; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Chase v. Cheney*, 58 Ill. 509; *Watson v. Farris*, 45 Mo. 133; *German Ref. Ch. v. Seibert*, 3 Barr, 291; *McGinnis v. Watson*, 41 Pa. St. 21; *Contra*, as to jurisdiction, *Watson v. Avery*, 2 Bush, 332; *Watson v. Avery*, 3 Bush, 635; See also *Altmann v. Benz*, 27 N. J. Eq. 331; *Hendrickson v. Shotwell*, 1 N. J. Eq. 577.

**§ 79      GOVERNMENT AND MEMBERSHIP: BY-LAWS.**

**§ 78. Benefit Societies doing a Life Insurance Business are like other Life Insurance Corporations.** — So far as corporations, carrying on a life insurance business, either on the plan of annual, semi-annual or quarterly premiums and the accumulation of a reserve fund, or upon the new assessment plan where calls are made, as necessity requires, monthly, or less or more frequently, are concerned, it may be said that it is hard to conceive of any reason why such organizations should be governed by any rules different from those regulating other corporations. The contracts of all alike must be judged by the laws applicable to all similar contracts of other corporations. The fundamental agreement of the members is contained in the charter and their affairs are administered and contracts made under the rules and restrictions there and in the by-laws contained, subject to the usual qualifications arising out of the application of the law of agency and estoppel.<sup>1</sup>

**§ 79. By-Laws: Definition of.** — By-laws, according to all the authorities <sup>2</sup> are merely rules, prescribed by the majority of the members of an association or corporation, under authority of the other members, for the regulation and management of their joint affairs. In both voluntary and incorporated associations the power depends upon the articles of association, or charter, which is the fundamental law.<sup>3</sup> In the case of a corporation the law “ tacitly annexes to it the power of making by-laws or private statutes, for its government and support.” <sup>4</sup> and it is implied in every charter that the majority shall have power to make needful by-laws for the regulation of the affairs of the corporation.

<sup>1</sup> Morawetz on Corp., Chap. VII.

<sup>2</sup> Morawetz on Corp., § 491; Ang. & Ames on Corp., § 327.

<sup>3</sup> St. Mary's, etc., v. Burford's Admr., 70 Pa. St. 321.

<sup>4</sup> Ang. & Ames on Corp., § 325.

By-laws properly adopted are as binding upon all the members of the association as a provision contained in the charter itself.<sup>1</sup>

§ 80. **By Whom and how Made: Repeal: Vested Rights.** — Unless delegated to a select body by the articles of association or charter, the power to make by-laws resides in the body of members themselves and is to be exercised by the majority.<sup>2</sup> If the charter, or the fundamental agreement of the members, prescribe the mode in which the by-laws shall be made and adopted, in order to insure their validity, that mode must be strictly pursued,<sup>3</sup> but if the charter is silent on this subject, the association may adopt by-laws "by its own acts and conduct, and the acts and conduct of its officers, as by an express vote, or an adoption manifested in writing."<sup>4</sup> The same body which can make by-laws has the power to amend or repeal them, subject to the additional restrictions and limitations of the by-laws themselves as well as those of the articles of association.<sup>5</sup> But no by-law can be repealed so as to impair or affect vested rights, for the members have the right to rely upon the by-laws which, as between themselves, are contracts. A by-law that will disturb a vested right is unreasonable.<sup>6</sup>

§ 81. **Binding upon All Members: All are Presumed to Know Them.** — The by-laws of a society are binding upon all the members and all are conclusively presumed to

<sup>1</sup> Morawetz on Corp., § 491.

<sup>2</sup> Morawetz on Corp., § 491; Ang. & Ames on Corp., § 327.

<sup>3</sup> Dunston v. Imperial Gas Co., 3 B. & Ad. 125.

<sup>4</sup> Ang. & Ames on Corp., § 328; Union Bank v. Ridgely, 1 Harr. & G. 324.

<sup>5</sup> Morawetz on Corp., § 499; Ang. & Ames on Corp., § 329.

<sup>6</sup> Pellazzino v. Germ. Catholic, etc., Soc., 16 Cin. L. Bul. 27; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Morrison v. Wisconsin Odd-fellows, etc., Co., 59 Wis. 162; Poultney v. Bachman, 62 How. Pr. 466; Gundlach v. Germania Mech. Assn., 49 How. Pr. 190. But see Fugure v. Soc. St. Joseph, 46 Vt. 362.

know them. The Supreme Court of Indiana says: <sup>1</sup> "One who becomes a member of such an organization is chargeable with knowledge of its laws and rules and is bound by them. He cannot be ignorant of them, nor can he refuse obedience to them, unless, indeed, they are illegal, or require the performance of acts which the law forbids. By-laws not in themselves illegal and not requiring the performance of acts contrary to law, must, therefore, be deemed binding upon all persons who become members." <sup>2</sup> The reason of this rule is, that by becoming a member, one impliedly agrees to be bound by all legal acts of the majority under the compact of the articles of association. <sup>3</sup> Eleemosynary corporations, however, have no incidental powers to make by-laws. <sup>4</sup>

§ 82. **Requisites of Valid By-laws.** — All by-laws, to be valid, must have three essential and vital qualifications: (1) they must be consistent with the charter or articles of association; (2) they must not be in conflict with any provisions of statute or common law, and lastly (3) they must be reasonable. In the case of *Kent v. Quicksilver Mining Co.*, <sup>5</sup> the New York Court of Appeals said: "All by-laws must be reasonable and consistent with the general principles of the law of the land, which are to be determined by the courts when a case is properly before them. A by-law may regulate or modify the constitution of a corporation, but cannot alter it. The alteration of a by-law

<sup>1</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262.

<sup>2</sup> *Fugure v. Mut. Soc. St. Joseph*, 46 Vt. 368; *Simeral v. Dubuque Mut. F. Ins. Co.*, 18 Ia. 319; *Coles v. Ia. State Mut. F. Ins. Co.*, 18 Ia. 425; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Mitchell v. Lycoming Mut. F. Ins. Co.*, 51 Pa. St. 402; *People v. St. George Soc.*, 28 Mich. 261; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Sperry's Appeal (Pa.)*, 8 Cent. Rep. 215; 9 Atl. Rep. 478.

<sup>3</sup> *Morawetz on Corp.*, § 500a; *Ang. & Ames on Corp.*, § 359.

<sup>4</sup> *Ang. & Ames on Corp.*, § 330.

<sup>5</sup> 78 N. Y. 159.



is but the making of another on the same subject. If the first must be reasonable, and in accord with the principles of law, so must that be which alters it. If, then, the power is reserved to alter, amend, or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws agreeable to law."<sup>1</sup>

§ 83. **Must be Consistent with Charter.** — The prime essential of a valid by-law is that it be consistent with the charter or articles of association. Upon this subject the Supreme Court of Minnesota has said: <sup>2</sup> "These articles (of association) are its charter and, subject to the constitution and general laws of the State, its fundamental and organic law. Among other things they fix the rights of stockholders. They are in the nature of a fundamental contract, in form between the incorporators,— a contract which, as in other cases, neither party is at liberty to violate. This can no more be done through the form of by-laws and resolutions of the stockholders adopted and acted upon, than it can in any other way. The authority to pass by-laws, is, as a matter of course, authority to pass such as are consistent with the articles of incorporation, and not a power to subvert the law of corporate existence. The by-laws of a corporation are only rules and regulations as to the manner in which the corporate powers shall be exercised. Any attempt on the part of defendant, by by-laws or otherwise, to deprive an unconsenting stockholder of a right secured to him by the corporate articles, is in excess of corporate authority. or, in legal parlance, *ultra vires*."<sup>3</sup> In the same line is the declaration of the Supreme Court of Pennsylvania<sup>4</sup> that "no corporation can make any valid by-law in conflict with its charter. That would enable the corpora-

<sup>1</sup> Morawetz on Corp., §§ 494, 495, 496.

<sup>2</sup> Bergman v. St. Paul Mut. Bldg. Assn., 29 Minn. 278.

<sup>3</sup> Ang. & Ames on Corp., § 345.

<sup>4</sup> Diligent Fire Co. v. Commonwealth, 75 Pa. St. 291.

tion to make a new constitution for itself and thereby wholly defeat the object of the law which gave it birth." Upon analogy it follows that voluntary associations cannot pass beyond the limitations of their articles of association so as to bind members not thereto consenting, except by unanimous consent of all their members. By-laws in contravention of the provisions of a charter are void.<sup>1</sup> In a case in New York<sup>2</sup> where the general purpose of the society as declared in the articles of association were, declared to be the welfare of themselves and others, and particularly the mutual relief of the members in times of sickness and distress, it was held that "the society could extend its benefits to the families of its members, and that such provision in favor of the widows of deceased members, was not only highly meritorious, but fairly within the scope of the general purposes of the organization. The constitution and laws should have a liberal interpretation, for the purpose of promoting the general objects of the society, and, as such a provision for the benefit of the families of the members is in no way hostile or opposed to the general plan of the organization, I am of the opinion it should be upheld as a proper exercise of the powers conferred upon the association."<sup>3</sup>

§ 84. **Must not be Contrary to Common or Statute Law.**—The by-laws of all associations and corporations must not be contrary to either statute or common law. In the quaint language of Chief Justice Hobart:<sup>4</sup> "For, as reason is given to the natural body for the governing of it,

<sup>1</sup> Presb. Mut. Ass. Fund v. Allen, 106 Ind. 593; Raub v. Masonic Mut. Rel. Assn., 3 Mackey, 68; People ex rel. Stewart v. Father Matthew, etc., Soc., 41 Mich. 67; Ang. & Ames on Corp., § 345 and cases cited; Morawetz on Corp., § 494 and cases cited.

<sup>2</sup> Gundlach v. Germania Mech. Assn., 4 Hun, 339; 49 How. Pr. 190.

<sup>3</sup> Sup. Council, etc., v. Fairman, 10 Abb. N. C. 162; 62 How. Pr. 386; Barbaro v. Occidental Lodge, 4 Mo. App. 429.

<sup>4</sup> Norris v. Staps, Hob. 211.

so the body corporate must have laws, as a politic reason to govern it; but those laws must ever be subject to the general law of the realm, as subordinate to it." "If a corporation undertakes to make by-laws in contravention of the statute they are *ultra vires* and of no effect."<sup>1</sup> In *State v. Williams*<sup>2</sup> the Supreme Court, in passing upon a case where the ceremony of expulsion from a benevolent society involved a battery, held that it could not be lawfully inflicted. "It is not the less a battery because they were all members."<sup>3</sup> So a by-law of a society compelling members to join in a "strike" is void.<sup>4</sup> The Supreme Court of Massachusetts has said:<sup>5</sup> "The by-law should be construed with reference to the statute, and, if practicable, such a meaning should be given to it as will make the two consistent, for it is not to be assumed that the by-law is intended to go beyond the scope of the statute, and thus violate its provisions."<sup>6</sup>

§ 85. **Must be Reasonable.** — A third essential of all by-laws of every association is that they be reasonable. The power to make by-laws is upon the implied condition that it be exercised with discretion: it follows that all rules which are unequal, vexatious, oppressive, or manifestly detrimental to the interests of the society are void.<sup>7</sup> What

<sup>1</sup> *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291; *Briggs v. Earl*, 139 Mass. 473; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

<sup>2</sup> 75 N. C. 134.

<sup>3</sup> *Bell v. Hansley*, 3 Jones, 131.

<sup>4</sup> *People v. N. Y. Ben. Soc.*, 3 Hun, 361. But see *Snow v. Wheeler*, 113 Mass. 179.

<sup>5</sup> *Elsey v. Odd-fellows' Mut. Relief Assn.*, 142 Mass. 224.

<sup>6</sup> See cases collected in *Ang. & Ames on Corp.*, §§ 333-4-5, *et seq.*, specifying particular by-laws which are against statute or common law and therefore void.

<sup>7</sup> *Ang. & Ames on Corp.*, § 347; *Gosling v. Veley*, 12 Q. B. 347; *People v. Father Matthew, etc.*, 41 Mich. 67; *Cartan v. Father Matthew, etc.*, 3 Daly, 21.

are to be deemed reasonable by-laws depends upon the objects and purpose of the society and what might be proper in the case of a social club would be unreasonable if adopted by a benevolent organization.<sup>1</sup> Where the purpose of the society was to afford relief in sickness, and to provide for expenses of the funerals of deceased members and their families, it was held by the Supreme Court of Pennsylvania,<sup>2</sup> that a by-law providing that the widow of a member should not be entitled to benefits if the deceased came to his death because of intemperance was a reasonable regulation. In this case the court said: "An association of this kind is formed for the benefit of its members. Being a purely voluntary association, it may adopt such reasonable regulations as are conducive to their interests. Now, unless we deny that temperance and regularity of habits have much to do with health and long life, we must concede that the value of the benefits to be derived from such an association depends greatly on the good conduct of its members. Then clearly the members have not only a right to choose their associates, but to stipulate also for the power to prohibit their indulgence in those vices and crimes which multiply disease and death among them and thus diminish the general fund. It is not the purpose of the charter to regulate conduct, and that must be left to divine and human laws. But this law strikes only at those acts which are the causes of disease and death. \* \* \* The by-law therefore appears to be reasonable and to promote the well being of all the associates collectively and individually." In the same State it was held,<sup>3</sup> that where a society was formed for mutual assistance in time of sickness or inability to labor a by-law that "no soldier of a standing army, seaman or mariner shall be capable of ad-

<sup>1</sup> Commonwealth v. St. Patrick's Benev. Soc., 2 Binn. 441.

<sup>2</sup> St. Mary's Ben. Soc. v. Burford's Admr., 70 Pa. St. 321.

<sup>3</sup> Franklin v. Commonwealth, 10 Pa. St. 359.

mission" was held good, and also the further provision that if a member should enlist as a soldier or become a mariner he should forfeit his membership. By-laws compelling members to do what is absurd, or of no benefit to themselves or the society are unreasonable,<sup>1</sup> and all by-laws conflicting with express statute law or public policy are void as unreasonable. A by-law, to be reasonable, must be adapted to the purposes of the society.<sup>2</sup> A by-law to expel a member for villifying another member is void.<sup>3</sup> In the case just cited, Chief Justice Tilghman said: "The offense of villifying a member, or a private quarrel, is totally unconnected with the affairs of the society and therefore its punishment cannot be necessary for the good government of the corporation."<sup>4</sup> A by-law must be equal in its operation and apply to all members alike, it cannot exempt certain members from its operations.<sup>5</sup> A by-law which provides for the expulsion of a member without notice is void, because unreasonable;<sup>6</sup> and so are provisions for forfeitures without notice or opportunity to be heard;<sup>7</sup> and by-laws having a retroactive, or

<sup>1</sup> Ang. & Ames on Corp., § 348.

<sup>2</sup> *People v. Med. Soc. of Erie*, 24 Barb. 570; *Commonwealth v. German Soc.*, 15 Pa. St. 251; *People v. Med. Soc.*, etc., 32 N. Y. 189; *Dickenson v. Chamber of Commerce*, etc., 29 Wis. 49.

<sup>3</sup> *Commonwealth v. St. Patrick's Benev. Soc.*, 2 Binn. 441.

<sup>4</sup> *Schmidt v. Abraham Lincoln Lodge (Ky.)*, 2 S. West. Rep. 156; *Mulroy v. Supreme Lodge Knights of Honor*, 28 Mo. App. 463; *Commonwealth v. German Soc.*, 15 Pa. St. 251; *Evans v. Phila. Club*, 50 Pa. St. 107; *Erd v. Bavarian*, etc., Assn. (Mich.), 34 N. W. Rep. 555; 11 West. Rep. 171; *Allnutt v. High Court of Foresters (Mich.)*, 28 N. W. Rep. 802.

<sup>5</sup> *People v. Father Matthew*, etc., 41 Mich. 67; *Taylor v. Griswold*, 14 N. J. L. 223.

<sup>6</sup> *Pulford v. Fire Department*, etc., 31 Mich. 458; *Fritz v. Muck*, 62 How. Pr. 72; *Wachtel v. Noah Widows'*, etc., 84 N. Y. 28; *Commonwealth v. Penn. Ben. Assn.*, 2 Serg. & R. 141; *Erd v. Bavarian*, etc., Assn. (Mich.), 34 N. W. Rep. 555; 11 West. Rep. 171.

<sup>7</sup> *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 89; *Commonwealth v. Germ. Soc.*, 15 Pa. St. 251; *Queen v. Saddlers' Co.*, 10 H. of L. Cas. 404; *Pul-*

*ex post facto* effect.<sup>1</sup> A by-law providing that the trustees first elected shall hold office during life is void.<sup>2</sup> So is a by-law of a beneficiary society making an appeal of a member to the civil courts a cause for expulsion.<sup>3</sup> Whether or not a by-law of a benefit society, to the effect, that if a member "neglects his Easter duties," he thereby forfeits all his rights and interests in the society, is good is doubtful.<sup>4</sup>

§ 86. **Construction of By-Laws Question for the Court.** — The construction of by-laws is in all cases a question for the court. In construing by-laws courts will interpret them reasonably; not scrutinizing their terms for the purpose of making them void, nor holding them invalid for slight or trivial reasons; the unreasonableness should clearly appear.<sup>5</sup> If associations are organized for benevolent purposes, courts will not construe their constitutions and by-laws so as to favor the forfeiture of the rights of the members or those dependent on them.<sup>6</sup> By-laws will

ford *v.* Fire Dept., 31 Mich. 458; Butchers' Ben. Assn., matter of, 38 Pa. St. 298; Green *v.* African, etc., Soc., 1 Serg. & R. 254.

<sup>1</sup> Pulford *v.* Fire Dept., 31 Mich. 458; Taylor *v.* Griswold, 14 N. J. L. 223; Phillips *v.* Wickham, 1 Paige, 590; Howard *v.* Savannah, etc., Charlt. (Ga.), 173; Kent *v.* Quicksilver M. Co., 78 N. Y. 159. See § 92.

<sup>2</sup> State *v.* Standard L. Assn., 38 Ohio St. 281.

<sup>3</sup> Sweeney *v.* Rev. Hugh McLaughlin Ben. Soc., 14 W. N. C. 466.

<sup>4</sup> Matt *v.* Roman Cath. M. Prot. Soc., 70 Ia. 455.

<sup>5</sup> Genest *v.* L. Union, etc., 141 Mass. 417; Paxson *v.* Sweet, 1 Green, 196; State *v.* Overton, 24 N. J. L. 440; Queen *v.* Saddlers' Co., 10 H. of L. Cas. 404; People *v.* Sailors' Snug Harbor, 5 Abb. Pr. (N. S.) 119; Butcher's Benef. Assn., 38 Pa. St. 298; People *v.* Med. Soc. Erie, 32 N. Y. 187; Fritz *v.* Muck, 62 How. Pr. 72; Commonwealth *v.* Worcester, 3 Pick. 462; St. Mary's Benef. Soc. *v.* Burford's Admr., 70 Pa. St. 321; People *v.* Father Mathew, etc., 41 Mich. 67; Poultney *v.* Bachman, 62 How. Pr. 466; Pulford *v.* Fire Department, 31 Mich. 458; Ang. & Ames on Corp., § 357.

<sup>6</sup> Schunck *v.* Gegenzeiten, etc., 44 Wis. 369; Erdmann *v.* Mut. Ins. Co., etc., 44 Wis. 376; Ballou *v.* Gile, 50 Wis. 614; Schillinger *v.* Boes, 9 Ky. L. Rep. 18.

be construed in reference to the statutes so as to give them effect if possible.<sup>1</sup>

§ 87. **What is Bad as a By-Law, May be Good as a Contract: Exception.** — What is bad as a by-law, as against common right, may however be good as a contract since, as a learned writer expresses it:<sup>2</sup> “A man may part with a common right voluntarily, of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or perhaps knowledge, by those who would not consult his individual interests.”<sup>3</sup> The unanimity of the vote of those present at a meeting will not bind or affect the rights of those absent where the vote is unauthorized.<sup>4</sup> Yet certain rights are esteemed so sacred that they cannot even be parted with by contract, because to permit such action would be against public policy. It has accordingly been held that a by-law prohibiting members from resorting to the courts, especially where a property right is involved, is void;<sup>5</sup> and a by-law of a mutual beneficial society cannot oust the courts of jurisdiction to determine whether a member of it has been expelled for sufficient cause. Neither can it make an appeal to the civil courts a cause of expulsion.<sup>6</sup>

§ 88. **Enforcement of By-laws.** — The power to make by-laws implies the right to enforce them by appropriate penalties. No general rule can be laid down as to what is

<sup>1</sup> *Elsey v. Odd-fellows*, 142 Mass. 224; *Am. Legion of Honor v. Perry*, 140 Mass. 580.

<sup>2</sup> *Ang. & Ames on Corp.*, § 342.

<sup>3</sup> *Austin v. Searing*, 16 N. Y. 112; *Goddard v. Merchants' Exchange*, 79 Mo. 609; 9 Mo. App. 290.

<sup>4</sup> *Stetson v. Kempton*, 13 Mass. 282.

<sup>5</sup> *Supreme Council, etc., v. Garrigus*, 104 Ind. 133; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Mulroy v. K. of H.*, 28 Mo. App. 463; *Scott v. Avery*, 5 H. of L. Cas. 811; *Insurance Co. v. Morse*, 20 Wall. 445; *Austin v. Searing*, 16 N. Y. 112.

<sup>6</sup> *Sweeney v. Rev. Hugh McLaughlin Ben. Soc.*, 14 W. N. C. 466.

a reasonable penalty, this must be determined by the nature of the offense. The courts in each case will determine the reasonableness of the penalty. Without going extensively into the subject, it may be said the penalty must be a sum certain; the specification in the charter of one method of enforcing by-laws is an exclusion of other methods; the offender cannot be imprisoned or his property forfeited for any violation of rules, nor can the offender be disfranchised. The penalty can only be given to the society whose regulations are infringed. In a Michigan case<sup>1</sup> the Supreme Court of that State discussed the doctrines of the law on this subject somewhat elaborately and in the discussion said: "It is well settled that the right to levy burdens on the members is governed to some extent, at least, by the occasion for them."<sup>2</sup> As the original constitution contained no authority to forfeit membership, the power must be derived elsewhere. The charter contains no such power. It is held in *Matter of Long Island R. R. Co.*<sup>3</sup> that there can be no power to impose forfeitures unless granted by clear legislative enactment. No such power is consistent with ancient right and it cannot be obtained from anything but the sovereignty.<sup>4</sup> "The only implied means for the enforcement of corporate charges and penalties is by action. Summary means and methods unknown to the common law must be authorized by express authority. And it would not be reasonable to enforce a pecuniary obligation or penalty by means disproportionate to its importance. The law of the land is made the test for analogies in cases where it affords analogies, as is recognized in the case cited and elsewhere. It is equally abhorrent to all reason to allow a forfeiture to be enforced on an alleged default, without

<sup>1</sup> *Pulford v. Fire Department*, 31 Mich. 458.

<sup>2</sup> *London Pipe Co. v. Woodroffe*, 7 B. & C. 838.

<sup>3</sup> 19 Wend. 37.

<sup>4</sup> *Westcott v. Minnesota Mining Co.*, 23 Mich. 145; *Kyd on Corp.* 109; *Ang. & Ames on Corp.*, § 360 and § 340.



notice and hearing, or an opportunity to be heard.<sup>1</sup> If any expulsion could be had for such a cause, the by-laws themselves expressly require that there shall be a trial before the trustees, who for this purpose act as a corporate tribunal. But inasmuch as our general corporation law has always limited the penalties for violations of by-laws, expulsion cannot be allowed for any mere infraction of a by-law.”<sup>2</sup>

**§ 89. Distinction between Voluntary Associations where no Property Right is Involved, and Corporations in Regard to By-laws.** — If no property right be involved a distinction is made, in respect to by-laws and regulations, between incorporated societies and those which are voluntary associations. In the former the by-laws must be reasonable, but in the latter the members are bound by their duly adopted by-laws and regulations, whether they be reasonable or not, provided, however, they are not in conflict with the law of the land, or public policy, and the courts will only examine whether they have been adopted in the way agreed on by the members.<sup>3</sup> In *Kehlenbeck v. Logeman*,<sup>4</sup> the court said: “It has been held in this court upon more than one occasion in respect to the by-laws of a voluntary association the court has no visitorial power and cannot determine whether they are reasonable or unreasonable, and the only question which it can examine is whether they have been adopted in the way which has been agreed upon by the members of the association. \* \* \* The association being a voluntary one, as has above been stated, this court

<sup>1</sup> *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 89; *Commonwealth v. Germ. Soc.*, 15 Pa. St. 251; *Queen v. Saddler's Co.*, 10 H. of L. Cas. 404; *Com. v. Penn. Benev. Assn.*, 2 Serg. & R. 141.

<sup>2</sup> *Ang. & Ames on Corp.*, § 360; *Erd v. Bavarian, etc., Assn.* (Mich.), 34 N. W. Rep. 555; 11 West. Rep. 171; *Otto v. Journeymen Tailors', etc., Union* (Cal.), 17 Pac. Rep. 217.

<sup>3</sup> *Elsas v. Alford*, 1 City Ct. Rep. 123; *Manning v. San Antonio Club*, 63 Tex. 166; *McDonald v. Ross-Lewin*, 29 Hun, 87.

<sup>4</sup> 10 Daly, 447.

has no power to pass upon the question as to whether such rules and regulations as they choose to adopt for the guidance of their own affairs are reasonable or unreasonable.”<sup>1</sup> It is doubtful, however, if this rule applies in all cases, especially those in which property rights are involved or principles of public policy are violated. Agreements to refer any controversy to arbitrators have not always been upheld,<sup>2</sup> especially when harsh or involving forfeitures.<sup>3</sup>

**§ 90. Societies have a Right to the Service of their Members.** — It is a general rule that all societies have the right to the service of all their members subject to the contract of the articles of association and the modifying circumstances of the case. The principle applies to corporations, and is thus laid down by an admitted authority: <sup>4</sup> “A corporation has a right to the service of all its members, and may make by-laws to enforce it.. It may thus impose a penalty on members eligible to an office, who refuse to accept it; or who refuse to take the oath appointed by law, as a necessary qualification for holding it; and on members who refuse to attend the corporate meetings. Nor, it would seem, is a by-law of this nature less valid, though it require that the person accepting the office shall pay a fee on his admission; and the court will not scrutinize the reasonableness of the fee, since the members of the corporation have assented to the reasonableness of the amount; which raises a presumption that under their pecu-

<sup>1</sup> *White v. Brownell*, 2 Daly, 329; *Hyde v. Woods*, 2 Saw. 655; *Innes v. Wylie*, 1 Car. & K. 262; *Fritz v. Muck*, 66 How. Pr. 74.

<sup>2</sup> *Heath v. N. Y. Gold Exch.*, 7 Abb. Pr. (N. S.) 251; 38 How. Pr. 168; *Savannah Cotton Exchange v. State*, 51 Ga. 668.

<sup>3</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133; *Austin v. Searing*, 16 N. Y. 112; *Mulroy v. Supreme Lodge K. of H.*, 28 Mo. App. 463; *Goodman v. Jedidjah Lodge*, 65 Md. 236; *Gray v. Christian Soc.*, 137 Mass. 329; *s. c.* 50 Am. Rep. 310. See *post*, § 450.

<sup>4</sup> *Ang. & Ames on Corp.*, § 352.

liar circumstances it is reasonable, or, at least, that they deem it so.”

§ 91. **The Articles of Association, or Charter, forms a Contract between the Society and the Members.** — The rights of members of all societies, incorporated or not, depend upon the articles of association or charter to which the member assents upon becoming such. Practically, all the cases which relate to societies or corporations and which are cited in this work, recognize this fact and declare the doctrine. The Supreme Court of Pennsylvania says: <sup>1</sup> “Each member pledges himself to obey these laws as a condition of his membership, by an express undertaking in signing the constitution, and his promise to support the constitution and by-laws as a brotherly member. Nor is this pledge executed under the by-laws until he shall have answered on his word of truth that he is acquainted with the constitution and by-laws. \* \* \* The association having the right under its charter to make the by-law for the well being of the society and the proper regulation of its affairs, the regulation being a reasonable and proper one, contributing to the value of membership, and the good of the association, and the member having accepted the by-law in express terms in his entry into membership, the by-law constitutes a part of the terms of the contract.” In Texas the Supreme Court of the State has said: <sup>2</sup> “When membership in certain societies confers upon the individual important benefits, as in aid societies, benevolent societies, etc., or peculiar advantages in trade and business, as in chambers of commerce, these are important valuable rights which are protected by the law of the land, and are generally secured in some way by the charter of incorporation. \* \* \* But we think it has been generally held that clubs or societies,

<sup>1</sup> St. Mary's Benef. Soc. v. Burford's Admr., 70 Pa. St. 321.

<sup>2</sup> Manning v. San Antonio Club, 63 Tex. 166; s. c. 51 Am. Rep. 629.

whether religious, literary or social, have the right to make their own rules upon the subject of the admission or exclusion of members, and these rules may be considered as articles of agreement to which all who become members are parties. \* \* \* The fact that a club or society is incorporated would not, we think, in any way affect its right to make its own rules, unless there was something in the charter or in the general law under which it was incorporated which controlled it in this respect.”<sup>1</sup>

§ 92. **By-laws Relating to Sick Benefits.** — Many benefit societies provide in their by-laws for a certain sum to be paid to a member in case of his sickness. The question has sometimes arisen as to the respective rights and liabilities of the member and the society in regard to these benefits. In all these cases it has been held that the laws of the society are to be considered in determining the right, and they are to govern unless contrary to municipal law. In *St. Patrick's Male Soc. v. McVey*,<sup>2</sup> the Supreme Court of Pennsylvania held that a member of a beneficial society does not stand in the relation of a creditor to it, and can only claim such benefits as are prescribed by the by-laws existing at the time he applies for relief; that it is wrong to treat the by-law, in existence when the plaintiff became a member, as part of a contract unalterable except with his

<sup>1</sup> *Van Poucke v. Netherland Soc. (Mich.)*, 6 West. Rep. 132; 29 N. W. Rep. 863; *Sperry's Appeal (Pa.)*, 8 Cent. Rep. 215; 9 Atl. 478; *McCabe v. Father Mathew, etc.*, 24 Hun, 149; *Gooch v. Assn. Aged Females*, 109 Mass. 558; *Skelly v. Private Coachmen's Ben. Soc.*, 13 Daly, 2; *Bauer v. Sampson Lodge K. of P.*, 102 Ind. 262; *Harrington v. Workingmen's Assn.*, 70 Ga. 340; *Black & Whitesmith's Soc. v. Vandyke*, 2 Whart. 312; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Fleming v. Hector*, 2 M. & W. 171; *Innes v. Wylie*, 1 Car. & K. 262; *Brancett v. Roberts*, 7 Jur. (N. S.) 1185; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Thompson v. Adams*, 7 W. N. C. 281; *Moxey's Appeal*, 9 W. N. C. 441; *Protchett v. Schaefer*, 11 Phila. 166; *Heath v. N. Y. Gold Exch.*, 38 How. Pr. 168; 7 Abb. Pr. (N. S.) 251.

<sup>2</sup> 92 Pa. St. 510.

consent. "It is manifest," said the court, "that the plaintiff ought not to have been allowed to recover under a by-law which had been repealed before he fell sick." In a case in New York,<sup>1</sup> it was held that in these societies the rights of the members may be taken away by an alteration of the constitution without notice unless the constitution provides for it. In this case the court said: "The plaintiff was bound by these changes. The charter gave no right of action. The constitution and by-laws were liable to change. The changes were made in the way pointed out by the constitution and laws. \* \* \* No notice was required to be given to plaintiff. The by-laws provide for none, and they do provide for a change by resolution proposed one week before it could be passed. It was doubtless designed that this delay would operate to give notice to all persons interested. A notice to all the members would be a great burden." In the same case it was said that whatever contract there was between the parties arose under the charter, constitution and by-laws of the society. In *Poultney v. Bachmann*,<sup>2</sup> the distinction was made that the society, after the sickness of a member began, and his right to benefits became vested, could not amend or change its laws so as to affect that right. In this case the court says: "By the happening of the contingency provided for — the sickness — the plaintiff's right to that sum — four dollars per week — during his sickness or disability — became a vested one, of which he could not be deprived. The contract is to be interpreted like any other contract of insurance, in which, as a rule, is incorporated a clause giving either the insured or insurer the right to end the risk. It would certainly be a somewhat novel construction of the clause conferring such power of termination, to hold, that, after a loss has occurred to the insured, against which the agreement was to protect,

<sup>1</sup> *McCabe v. Father Matthew, etc., Soc.*, 24 Hun, 149.

<sup>2</sup> 62 How. Pr. 466.

the payment of the sum stipulated for could be either reduced or repudiated by the insurer. Yet this, as it seems to me, is the precise position assumed by the defendant. Upon his becoming sick, as has been before stated, the plaintiff's right to four dollars per week during his illness became a vested one, and it would be most unreasonable and unconscientious so to construe the by-law giving the power of amendment, as to confer upon the members of the lodge the authority to deprive him of that to which he had thus become clearly entitled."<sup>1</sup>

§ 93. **Construction of Same.** — Like other by-laws, those relating to benefits must have a reasonable construction. Thus, it was held<sup>2</sup> that where the by-laws provided that a member who "became incapable of working, in consequence of sickness or accident," should receive from the society a certain sum per week, the member by trying to resume work and working two days during the period of sickness did not debar himself from receiving benefits during the time, as it could not be said as a matter of law that he was not "incapable of working" within the meaning of the by-law. Provisions for benefits in case of "sickness" do not extend to a case of bodily injury not affecting the general health of the person injured.<sup>3</sup> But insanity has been held to be sickness and disease.<sup>4</sup>

§ 94. **Proceedings to Obtain Sick Benefits: Rights of Members to Resort to Civil Courts.** — A member of a benefit society must, in applying for benefits under its by-

<sup>1</sup> *Pellazzino v. Germ. Cath. Soc.*, 16 Cin. L. Bul. 27; *Gundlach v. Germania Mech. Assn.*, 4 Hun, 339; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159. But see *Fugure v. Society St. Joseph*, 46 Vt. 362, and *Torrey v. Baker*, 1 Allen, 120. See *post*, §§ 94, 114.

<sup>2</sup> *Genest v. L'Union St. Joseph*, 141 Mass. 417.

<sup>3</sup> *Kelly v. Ancient Order of Hibernians*, 9 Daly, 289.

<sup>4</sup> *Burton v. Eyden*, 8 Q. B. 295.

laws, follow the procedure therein prescribed. In a case in Georgia the Supreme Court of that State, in passing upon the question whether a member could bring an action for his benefits, said: <sup>1</sup> "Among the objects of the organization of this benevolent association, it is evident that the mutual aid to be rendered to the members thereof by the observance of self-imposed duties and obligations was among the most important. It was to be a brotherhood of workmen; governed, managed and controlled by its own membership, under its own laws, without extrinsic compulsion. Its operations for the execution of its benevolent designs were to be internal, and by persons of its own appointment; provision was made to accomplish all the ends in view; there was nothing in any of its laws prohibited by statute or constitution; hence, whosoever became a member could only avail himself of the rights to be enjoyed in that way and manner provided by its own rules." In an early case, <sup>2</sup> the Supreme Court of Pennsylvania held in a similar case that, when the committee or tribunal created by the lodge or society had passed on the matter, the civil courts had no jurisdiction to inquire into the regularity of the proceedings. The court said: "The matter here, however, depends not merely on presumption of assent to a by-law, but on the charter to which the plaintiff expressly assented at his initiation; and he is consequently bound by everything done in accordance with it." In a very recent case, <sup>3</sup> the Supreme Court of Michigan held that if the by-law of a mutual benefit and co-operative insurance society was reasonable and valid, not oppressive nor against public policy, it forms part of the contract entered into between each member and his fellow-members constituting the so-

<sup>1</sup> *Harrington v. Workingmen's Benevolent, etc.*, 70 Ga. 340.

<sup>2</sup> *Black and Whitesmith's Society v. Vandyke*, 2 Whart. 309; 30 Am. Dec. 263.

<sup>3</sup> *Van Poucke v. Netherland, etc., Soc.*, 6 West. Rep. 132; 29 N. W. Rep. 863.

ciety; and all are bound by its terms. It is reasonable that the sick committee of such a society should be invested with authority to determine whether a member, claiming to be sick, is entitled to sick benefits, and when such benefits should cease. And further that a party can only recover sick benefits according to the terms prescribed in the by-laws; and if they provide for a committee to determine the question for him, and he has referred it to a committee, he has made it a tribunal to determine the question, and the decision of such committee is final. In Maryland the Court of Appeals has held<sup>1</sup> that one by becoming a member "assented to be governed by the tribe and council according to the regulations, it follows that he was bound by their application and construction in his own case. It is provided that the tribe shall determine matters of this kind, and the decision, on appeal, made final. These are private beneficial institutions operating on the members only, who for reasons of policy and convenience, affecting their welfare and, perhaps their existence, adopt laws for their government, to be administered by themselves, to which every person who joins them assents. They require the surrender of no right that a man may not waive, and are obligatory on him only so long as he chooses to recognize their authority. In the present instance the party appears to have been subjected to the general laws and by-laws according to the usual course, and if the tribunal of his own choice has decided against him he ought not to complain." In all the cases it has been held that the same principles govern as those applying to arbitrations, and when the prescribed forms have been observed without fraud and in good faith, the decision of the committee or society is final.<sup>2</sup> If the

<sup>1</sup> *Anacosta Tribe v. Murbach*, 13 Md. 91; 71 Am. Dec. 625.

<sup>2</sup> *Sperry's Appeal* (Pa.), 8 Cent. Rep. 215; 9 Atl. Rep. 478; *McAlees v. Supreme Sitting, etc.*, (Pa.), 13 Atl. Rep. 755; 12 Cent. Rep. 415; *Woolsey v. Odd-fellows, etc.*, 61 Iowa, 492; *Harrison v. Hoyle*, 24 Ohio St. 254; *Toram v. Howard Benef. Soc.*, 4 Pa. St. 519; *Osceola Tribe v. Schmidt*, 57



by-law is unequal or vexatious then the court will not be bound by it.<sup>1</sup> If the by-laws provide for no tribunal to test the right to benefits, the member may have an immediate right of action,<sup>2</sup> and of course an action lies to enforce the award of the lodge or society tribunal. The courts latterly incline to adopt the rule that where a society agrees, in consideration of the payment of dues, to pay a certain sum as benefits during a member's illness, it may not deprive the member of his right to resort to the courts in the first instance,<sup>3</sup> the theory being that "agreements to submit a matter to arbitration are valid when made after the specific controversy has actually arisen, and not where made in advance, certainly not when the agreement provides that one of the interested parties shall be sole arbitrator. The weight of authority is very decidedly against the power of parties to bind themselves in advance that a controversy that may possibly arise shall be conclusively settled by an individual or a corporation."<sup>4</sup>

§ 95. **Expulsion of Members.** — One of the most vital questions that arises in relation to the rights of members of societies and associations, whether incorporated or not, is that concerning the power of expulsion, and it becomes most important to inquire when and under what circumstances a member can be expelled and what procedure must

Md. 98; *Reg. v. Evans*, 3 El. & Bl. 363; 23 L. J. M. C. 100; *Grinham v. Card*, 7 Ex. 833; 21 L. J. Ex. 321.

<sup>1</sup> *Cartan v. The Father Mathew, etc.*, 3 Daly, 20; *Buecking v. Robert Blum Lodge*, 1 City Ct. Rep. 51.

<sup>2</sup> *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Smith v. Society etc.*, 12 Phila. 380; *Harrington v. Workingmen's, etc.*, 70 Ga. 340.

<sup>3</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262; *Supreme Council, etc., v. Garrigus*, 104 Ind. 133; *Harrington v. Workingmen's, etc.*, 70 Ga. 340; *Rigby v. Connol*, 24 L. R. Ch. D. 482.

<sup>4</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262, citing *Kistler v. Indianapolis, etc., R. R. Co.*, 88 Ind. 460; *Insurance Co. v. Morse*, 20 Wall. 445; *Mentz v. Armenia F. Ins. Co.* 79 Pa. St. 478; *Wood v. Humphrey*. 114 Mass. 185; *Austin v. Searing*, 16 N. Y. 112; *post*, § 107 and § 450.

be observed in the exercise by a society of this power. At the beginning of the discussion we must remember that benefit societies have a dual existence: they are social and fraternal in their nature, yet provide for their members, or their beneficiaries, certain pecuniary benefits, consequently, while expulsion in the case of a member of a church or club, or fraternity purely social, might be well enough, if the proceedings were regular, the same offenses in the case of a member of a benefit society could not be punished by expulsion having the consequences of a forfeiture of pecuniary rights. This distinction will appear more clearly as we proceed with the discussion of the subject.

§ 96. **Same Rules Apply to Incorporated and Unincorporated Societies.** — The same rules apply to voluntary, unincorporated associations as to incorporated societies. Upon this subject the court in a Pennsylvania case<sup>1</sup> says: "These associations have some elements in common with corporations, joint stock companies and partnerships; such as association and being governed by regulations adopted by themselves for that purpose. \* \* \* I have very little doubt, therefore, that the same rules of law and equity, so far as regards the control of them and the adjudication of their reserved and inherent powers to regulate the conduct and to expel their members, apply to them as to corporations and joint stock companies."<sup>2</sup>

§ 97. **Power of Corporation to Expel Members when Charter is Silent: Grounds for Expulsion.** — "When a corporation is duly organized," says the Supreme Court of Wisconsin,<sup>3</sup> "it has power to make by-laws and expel mem-

<sup>1</sup> *Leech v. Harris*, 2 Brewst. 571.

<sup>2</sup> *Gorman v. Russell*, 14 Cal. 531; *Loubat v. Leroy*, 15 Abb. N. C. 1; *Babb v. Reed*, 5 Rawle, 158; 28 Am. Dec. 650; *Otto v. Journeymen Tailor's, etc., Union (Cal.)*, 17 Pac. R. 217; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Lindley on Par.* 56.

<sup>3</sup> *State v. Chamber of Commerce*, 20 Wis. 71.

bers, though the charter is silent upon the subject. If the power is expressly granted in general terms, it is conferred to enable the corporation to accomplish the objects of its creation, and is limited to such objects or purposes. It appears to be well settled that where the charter of a corporation is either silent upon the subject of expulsion, or grants the power in general terms, there are but three legal causes of disfranchisement." These three causes were stated by Lord Mansfield,<sup>1</sup> and are again recited by the Supreme Court of Pennsylvania<sup>2</sup> as follows: "There is a tacit condition annexed to the franchise of a member, which, if he breaks, he may be disfranchised. The cases in which this inherent power may be exercised are of three kinds: 1. When an offense is committed, which has no immediate relation to a member's corporate duty, but is of so infamous a nature as renders him unfit for the society of honest men. Such are the offenses of perjury, forgery, etc. But before an expulsion is made for a cause of this kind it is necessary that there should be a previous conviction by a jury, according to the law of the land. 2. When the offense is against his *duty as a corporator*, and in that case he may be expelled on trial and conviction by the corporation. 3. The third is an offense of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land."<sup>3</sup>

§ 98. **English Rule as to Voluntary Associations.** — In England, however, it has been held that in the absence of any provision in the constitution or by-laws of an incorpo-

<sup>1</sup> *Rex v. Town of Liverpool*, 2 Burr. 732.

<sup>2</sup> *Commonwealth v. St. Patrick's Benevolent Soc.*, 2 Binney, 441; 4 Am. Dec. 453.

<sup>3</sup> *People v. Medical Society, etc.*, 32 N. Y. 187; *Dickenson v. Chamber of Commerce, etc.*, 29 Wis. 49; *People v. Medical Society*, 24 Barb. 577; *Leech v. Harris*, 2 Brewst. 571; *Society v. Commonwealth*, 52 Pa. St. 125; *Loubat v. Leroy*, 15 Abb. N. C. 1. See *post*, § 104.

## § 100 GOVERNMENT AND MEMBERSHIP: BY-LAWS.

rated voluntary association giving power of expulsion, there is no inherent power to expel a member, since it forms no part of the written contract by which the members are associated together.<sup>1</sup>

§ 99. **When no Power to Expel Exists.** — This power to disfranchise or expel members is incident to every corporation or society, except where formed primarily or exclusively for the purpose of gain, in which latter case such power cannot be exercised unless expressly granted by charter.<sup>2</sup> And where the corporation or society owns property, a member cannot be expelled or deprived of his interest in the stock and general funds unless this power is contained in the charter.<sup>3</sup>

§ 100. **Power to Expel Belongs to Body Generally: Cannot be Delegated.** — The power of expulsion of members of a society, club or corporation belongs to the body at large,<sup>4</sup> and, in the absence of the clearest authority in the constitution and by-laws, cannot be delegated to a committee or officer. Says one case:<sup>5</sup> “The transfer from the body of the society, where it properly belongs, to a small fraction of its members, of so large and dangerous a power as that of expulsion, must appear, if it be claimed

<sup>1</sup> *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615; affirmed, 44 L. T. Rep. (N. S.) 557.

<sup>2</sup> *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429; *Evans v. Philadelphia Club*, 50 Pa. St. 107.

<sup>3</sup> *Bagg's Case*, 11 Co. 99; *Davis v. Bank of England*, 2 Bing. 393; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *State v. Tudor*, 5 Day, 329; *Roehler v. Mechanics' Aid Society*, 22 Mich. 86; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Society v. Commonwealth*, 52 Pa. St. 125. See also note in 63 Am. Dec. 772 to *Hiss v. Bartlett*, 3 Gray, 468.

<sup>4</sup> *Hassler v. Phila. Mus. Assn.*, 14 Phila. 233; *Green v. African, etc., Society*, 1 Serg. & R. 254; *Commonwealth v. Pennsylvania Benef. Assn.*, 2 Serg. & R. 141; *Med. & Surg. Soc. v. Weatherly*, 75 Ala. 248; *Gray v. Christian Soc.*, 137 Mass. 329; s. c. 50 Am. Rep. 310.

<sup>5</sup> *Hassler v. Phila. Mus. Assn.*, 14 Phila. 233.

to exist, by the plainest language. It cannot be established by inference, or presumption, for no such presumption is to be made in derogation of the rights of the whole body, nor is it to be supposed, unless it appears by the most express and unambiguous language, that the members of the society have consented to hold their rights and membership by so frail a tenure as the judgment of a small portion of their own number." It has been held that the revision of membership lists by dropping certain names from the roll is equivalent to the expulsion of the members whose names are thus stricken off. "The revision," says the Supreme Court of Alabama,<sup>1</sup> "of the roll of members must, in our judgment, be the act of the society itself, transacted, as any other order of corporate business, by the recorded vote of the body in its corporate capacity, showing the fact that the roll was revised by at least a majority of the members present and constituting a quorum, voting in the affirmative," and further, "the clerical work of revision, is, in one sense, the act of the secretary, inasmuch as the duty of striking off names and the preparation of a revised list are devolved upon him. But the corporate act of revision, which is a legal ratification of the act of the secretary, is an order of business judicial in its character, and of great importance in its nature and results, and for these reasons, as we have said, must be transacted by a vote of the members in their corporate capacity."<sup>2</sup>

§ 101. Procedure for Expulsion: Notice. — All proceedings in the expulsion of members must be in substantial

<sup>1</sup> Medical & Surgical Soc. v. Weatherly, 75 Ala. 248.

<sup>2</sup> Gray v. Christian Society, 137 Mass. 329; s. c. 50 Am. Rep. 310; State ex rel. Sibley v. Carteret Club, 40 N. J. L. 295; Delacy v. Neuse River Navigation Co., 1 Hawks, 274; 9 Am. Dec. 636; People v. American Institute, 44 How. Pr. 468; Loubat v. Leroy, 40 Hun, 546; People v. Mechanics' Aid Soc., 22 Mich. 86; People v. Fire Dept., etc., 31 Mich. 458.

accordance with the letter of its rules.<sup>1</sup> While it has been held, that if the by-laws of the society provide for no notice, the member is not entitled to any notice, no property right being involved;<sup>2</sup> yet even in such case the proceedings must be had at a regular meeting for of only such is the member supposed to have knowledge.<sup>3</sup> It has often, however, been held that by-laws which provide for expulsion of a member without notice are void as being unreasonable.<sup>4</sup> Expulsion, if a property right is involved, must always be on notice, and, if no other method of notice is prescribed by the by-laws, it must be served personally and failure on the part of the member to give notice of a change of address as required by the laws of the society will not change the rule.<sup>5</sup> Mere posting in the corporate premises is not a sufficient notice.<sup>6</sup> Service of notice is not excused by a change of residence.<sup>7</sup> This notice must contain a statement of the charges against the member.<sup>8</sup> The mem-

<sup>1</sup> *Labouchere v. Earl of Wharnccliffe*, L. R. 13 Ch. Div. 346; *Commonwealth v. German Society*, 15 Pa. St. 251; *Wachtel v. Noah Widows' and Orphans'*, etc., 84 N. Y. 28; *People v. Am. Institute*, 44 How. Pr. 468; *Foster v. Harrison*, cited 72 Law Times, 185; 15 Abb. N. C. 45; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 87; *White v. Brownell*, 4 Abb. Pr. (N. s.) 162; *Med. & Surg. Soc. v. Weatherly*, 75 Ala. 248.

<sup>2</sup> *Manning v. San Antonio Club*, 63 Tex. 166; s. c. 51 Am. Rep. 639; *McDonald v. Ross-Lewin*, 29 Hun, 87; *People v. St. Franciscus*, etc., 24 How. Pr. 216.

<sup>3</sup> *Medical & Surgical Soc. v. Weatherly*, 75 Ala. 248.

<sup>4</sup> *People v. Fire Dept.*, 31 Mich. 458; *Fritz v. Muck*, 62 How. Pr. 72; *Erd v. Bavarian*, etc., Assn. (Mich.), 34 N. W. Rep. 555; 11 W. Rep. 171.

<sup>5</sup> *Wachtel v. Noah Widows' Orphans'*, etc., 84 N. Y. 28; *People v. Medical Society*, 32 N. Y. 187; *Commonwealth v. Penn. Ben. Assn.*, etc., 2 Serg. & R. 141; *Innis v. Wylie*, 1 C. & K. 257; *Downing v. St. Columba's*, etc., 10 Daly, 262; *Pulford v. Fire Department*, 31 Mich. 458; *Commonwealth v. German Society*, 15 Pa. St. 251; *People v. Musical*, etc., Union, 1 N. Y. S. R. 770; 47 Hun, 273.

<sup>6</sup> *State ex rel. Sibley v. Carteret Club*, 40 N. J. L. 295.

<sup>7</sup> *Wachtel v. Noah Widows'*, etc., Soc., 84 N. Y. 28; *Harmstead v. Washington Fire Co.*, 8 Phila. 331.

<sup>8</sup> *Murdock's Case*, 7 Pick. 303; *Murdock v. Phillips' Acad.*, 12 Pick. 244; *People v. Musical Mut. Protective Union*, 47 Hun, 273.

ber need not request a hearing,<sup>1</sup> nor does he waive notice by appearing and entering on his defense;<sup>2</sup> nor is notice waived by the member appearing at the time fixed for the hearing, and denying the right of the directors to proceed against him and refusing to answer the charges.<sup>3</sup> In *Fisher v. Keane*,<sup>4</sup> it was held that in proceedings to expel a member the committee or society is a *quasi-judicial* tribunal and are bound in proceeding under their rules against a member for alleged misconduct, to act according to the ordinary principles of justice and are not to convict him of an offense warranting his expulsion without giving him due notice of the intention to proceed against him and affording him an opportunity of defending or palliating his conduct.<sup>5</sup> The power to expel must be exercised *bona fide* and not capriciously or arbitrarily, or maliciously.<sup>6</sup>

§ 102. Procedure Continued: Charges: Trial. — If the by-laws so require, the charges against a member must be in writing and signed as required by the accuser and the notice must specify the time of hearing,<sup>7</sup> but by appearing generally the member waives objections as to notice and the regularity of the appointment of the tribunal.<sup>8</sup> The asso-

<sup>1</sup> *Loubat v. Leroy*, 40 Hun, 546; *Delacy v. Neuse Nav. Co.*, 1 Hawks (N. C.), 274; 9 Am. Dec. 636; *Loubat v. Leroy*, 65 How. Pr. 138.

<sup>2</sup> *Downing v. St. Columba's, etc.*, 10 Daly, 265. But see *Commonwealth v. Penn. Ben. Soc.*, 2 Serg. & R. 141; and § 102.

<sup>3</sup> *People v. Musical & Protective Union*, 47 Hun, 273.

<sup>4</sup> 11 L. R. Ch. D. 353; 49 L. J. Ch. 11; 41 L. T. 335.

<sup>5</sup> *Loubat v. Leroy*, 40 Hun, 546; *Gray v. Christ. Soc.*, 137 Mass. 329; 50 Am. Rep. 310; *Med. & Surg. Soc. v. Weatherly*, 75 Ala. 248.

<sup>6</sup> *Otto v. Journeymen Tailors', etc., Assn. (Cal.)*, 17 Pac. Rep. 217; *Hopkinson v. Marquis of Exeter*, 37 L. J. Ch. 173; 5 L. R. Eq. 63; 16 W. R. 266; *Lytleton v. Blackburne*, 45 L. J. Ch. 219; 33 L. T. (N. S.) 641; *Dawkins v. Antrobus*, 17 L. R. Ch. D. 615; 44 L. T. 557; 29 W. R. 511.

<sup>7</sup> *Society, etc. v. Commonwealth*, 52 Pa. St. 125; *People v. Musical, etc., Union*, 47 Hun, 273; *People v. American Institute, etc.*, 44 How. Pr. 468.

<sup>8</sup> *Sperry's Appeal (Pa.)*, 8 Cent. Rep. 215; 9 Atl. Rep. 478; *Burton v. St. George's Soc.*, 28 Mich. 261; *Commonwealth v. Penn. Ben. Soc.*, 2 Serg. & R. 141. See § 101, *ante*.

ciation must act fairly and in good faith and it will be held to a fair and honest administration of its rules. The accused must be allowed to be present to confront his accusers and cross-examine them, for "ordinary principles of justice and of right" require this to be done.<sup>1</sup> In the case first cited<sup>2</sup> it was said, after a review of the authorities, that "the principle to be deduced from all these cases is, that in every proceeding before a club, society or association having for its object the expulsion of a member, the member is entitled to be fully and fairly informed of the charge and to be fully and fairly heard." The court further said: "Again while these proceedings are not to be governed by the strict rules which apply to actions at law or suits in equity, or even, perhaps, by the rules which obtain in regard to arbitrations, there is, I think, a strong analogy between the principles which govern in arbitrations and those which relate to proceedings of this character. In the case of *Sharpe v. Bickerdyke*,<sup>3</sup> Lord Eldon said that, by the 'great principle of eternal justice which was prior to all these acts of *sederunt* regulations and proceedings of court, it was impossible an award could stand where the arbitrator heard one party and refused to hear the other; and on this great principle, and on the fact that the arbitrator had not acted according to the principles upon which he himself thought he ought to have acted, even if he decided rightly he had not decided justly, and therefore the award could not stand.' In the matter of *Plews v. Middleton*<sup>4</sup> an award was set aside, because the three arbitrators, after having determined within a small amount the sum to be paid, agreed to examine a witness separately and did so. Coleridge, J., in that case says: 'To uphold this award would be to authorize

<sup>1</sup> *Hutchinson v. Lawrence*, 67 How. Pr. 47; *Otto v. Journeymen Tailors' Assn. (Cal.)*, 17 Pac. Rep. 217.

<sup>2</sup> *Hutchinson v. Lawrence*.

<sup>3</sup> 3 Dow's Rep. 102.

<sup>4</sup> 6 A. & E. (N. S.) 845; 14 L. J. Q. B. 139; 9 Jur. 161



a proceeding contrary to the first principles of justice. The arbitrators here carried on examinations apart from each other and from the parties to the reference, whereas it ought to have been conducted by the arbitrators and umpire jointly, in the presence of the parties.' In *Oswald v. Earl Grey*,<sup>1</sup> it was held that no usage can justify the arbitrators in hearing one party and his witnesses only, in the absence of and without notice to the other party.<sup>2</sup> In *Walker v. Frobisher*,<sup>3</sup> an award was set aside, the arbitrator having received evidence after notice to the parties that he would receive no more, in which they acquiesced. In this case Lord Eldon says: 'A judge must not take it upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice, but upon general principles it cannot be supported.' \* \* \* In *Drew v. Leburn*,<sup>4</sup> it was held 'that an arbitrator greatly errs, if he, in any of the minutest particulars, takes upon himself to listen to evidence behind the back of any of the parties to the submission.'"<sup>5</sup> "Hearing" means a right to have counsel and opportunity to question witnesses and offer evidence;<sup>6</sup> and the trying body must be unprejudiced.<sup>7</sup> In a recent case,<sup>8</sup> the Supreme Court of California thus reviewed the general principles applicable to these proceedings: "The right of expulsion from associations of this character may be based

<sup>1</sup> 24 L. J. Q. B. 69.

<sup>2</sup> See *In re Brook*, 15 C. B. (N. S.) 403; 33 L. J. C. P. 246; 10 L. T. 378.

<sup>3</sup> 6 Ves. 69.

<sup>4</sup> 2 Macq. H. of L. Cas. 1.

<sup>5</sup> *Fisher v. Keane*, 11 L. R. Ch. D. 353; *Dean v. Bennett*, L. R. 6 Ch. 489; *Innes v. Wylie*, 1 Car. & K. 257, 263; *Queen v. Saddlers' Co.*, 10 H. L. Cas. 404; *State v. Adams*, 44 Mo. 570; *Wood v. Wood*, L. R. 9 Exch. 190; *Fuller v. Plainfield Academy*, 6 Conn. 532; *Gray v. Christ. Soc.*, 187 Mass. 329.

<sup>6</sup> *Murdock v. Phillips Academy*, 12 Pick. 244.

<sup>7</sup> *Smith v. Nelson*, 18 Vt. 511.

<sup>8</sup> *Otto v. Journeymen Tailors', etc., Union*, 17 Pac. Rep. 217.

and upheld upon two grounds: *First*, a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation; *second*, for such conduct as clearly violates the fundamental objects of the association, and, if persisted in and allowed, would thwart those objects or bring the association into disrepute. We content ourselves with stating the propositions thus broadly, and, for the purposes of this case, need not refer to the numerous authorities defining and limiting the power. In the matter of expulsion the society acts in a *quasi-judicial* character, and, so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land, or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal.<sup>1</sup> The courts will, however, decide whether the ground for expulsion is well taken.<sup>2</sup> It has been held in reference to the expulsion of members from societies of this character, that the courts have no right to interfere with the decisions of the societies, except in the following cases: *First*. If the decision arrived at was contrary to natural justice, such as the member complained of not having an opportunity to explain misconduct. *Secondly*. If the rules of the club have not been observed. *Thirdly*. If the action of the club was malicious and not *bona fide*.<sup>3</sup> Article 25 of the appellant's constitution provides as follows: 'If any member defrauds this union, he shall be dealt with as the central body may decide.' Beyond this no specific provision appears in the constitution or by-laws under which members may be expelled. The contention of appellant is

<sup>1</sup> *Commonwealth v. Society*, 8 Watts & S. 250; *Burt v. Grand Lodge*, 44 Mich. 208; 33 N. W. Rep. 13; *Robinson v. Yates City Lodge*, 86 Ill. 598.

<sup>2</sup> *Cotton Exchange v. State*, 54 Ga. 668.

<sup>3</sup> *Dawkins v. Antrobus*, 17 L. R. Ch. D. 615; 44 L. T. 557; 29 W. R. 511; *Lambert v. Addison*, 46 L. T. 20.

that the power of expulsion is inherent in every society, and that the offense of which plaintiff was found guilty was sufficient ground for expulsion, as matter of law, irrespective of any provision of the constitution or by-laws. We subscribe to that portion of the proposition which asserts the inherent right of expulsion, subject, however, to the limitations hereinbefore expressed. For the purposes of this case we assume, also, without deciding. — *First*, that the charges and specifications against plaintiff were sufficient, upon being proven, to warrant his expulsion under the inherent right so to do mentioned; *second*, that the ‘central body,’ — that is to say, the board of delegates of shop societies, as contradistinguished from the entire body of members, may exercise the power of expulsion. Conceding these propositions, however (so far as the latter is concerned, we doubt if it can be maintained), the facts as found by the court still remain, that the plaintiff was really and in fact found guilty for no other offense than that for which he was expelled in the first instance, viz., for working for parties against whom a strike had been ordered; that the expulsion was not in good faith, was not fair, and was contrary to natural justice; that the charge of ‘conspiracy to injure and destroy the union,’ was in substance but a pretext to punish him for an offense only subjecting him to a fine, in a manner wholly different from the imposition of the penalty provided therefor, etc. We think, as before stated, that there was evidence from which the facts as found were fairly deducible. These facts raise the inevitable conclusion, that the trial and conviction of plaintiff was a travesty upon justice, and lacking in the essential elements of fairness, good faith and candor, which should characterize the action of men in passing upon the rights of their fellow-men. We are referred to the provision of appellant’s constitution which provides that ‘any member having a grievance, shall have the right to lay his case be-

fore the central body, who shall take action thereon, and whose decision shall be final.' No doubt when action is properly taken in the manner indicated, it is final, and the courts will not interfere, but when, under the guise of remedying the grievance of a member, the central body acts in bad faith, and maliciously makes the subject of the grievance a pretext for oppression and wrong, its action may, however, to that extent, be the subject of review." It would seem from analogy at least that a record should be kept of the proceedings of the society or committee in acting upon accusations against a member, that the charges be specific and that the proof must correspond and be sufficient. "The facts must be stated as found after a formal investigation and not rest upon inference alone," and the findings must support the charge.<sup>1</sup>

§ 103. Charges must be Sufficient. — The charges must not be trivial in their nature or trifling. The following accusations have been held to be insufficient to justify expulsion or suspension: "Slander against the society;"<sup>2</sup> "illegally drawing aid in time of sickness;"<sup>3</sup> "defrauding the society out of 50 cents;"<sup>4</sup> "villifying a member;"<sup>5</sup> "doing business at less than the established tariff of the

<sup>1</sup> *Schweiger v. Society*, 13 Phila. 113; *Commonwealth v. St. Patrick's Benevolent Society*, 2 Binn. 441; *Roehler v. Mechanic's Aid Society* 22, Mich. 86; *State v. Adams*, 44 Mo. 570.

<sup>2</sup> *Roehler v. Mechanic's Aid Soc.*, 22 Mich. 86. In this case, although the charge was held insufficient, and the member restored, it was said that if a member of a society can be expelled for "slander against the society," the offense must be analogous to the common-law offense of slander, as applicable to individuals. See *Allnutt v. High Court of Foresters* (Mich.), 28 N. W. Rep. 802.

<sup>3</sup> *Schweiger v. Society*, 13 Phila. 113.

<sup>4</sup> *Commonwealth v. German Soc.*, 15 Pa. St. 251.

<sup>5</sup> *Commonwealth v. St. Patrick's Soc.*, 2 Binn. 441; 4 Am. Dec. 453; *Mulroy v. Knights of Honor*, 28 Mo. App. 463.

society;”<sup>1</sup> “unprofessional conduct in advertising;”<sup>2</sup> “disrespectful and contemptuous language to associates;”<sup>3</sup> stating that the lodge would not pay and never intended to pay.<sup>4</sup> Defamation by a member of the character of another member is, by common law, no cause of discipline.<sup>5</sup> Fraud, such as representing himself in good health, when in fact he had an incurable disease, is a ground of expulsion,<sup>6</sup> and generally it may be said that violations of reasonable by-laws are sufficient to justify infliction of the penalty prescribed, whether it be suspension or expulsion.<sup>7</sup> The courts will look at the facts in each case and, construing the by-laws to be reasonable when they are calculated to carry out the objects of the association, and are not unjust under the circumstances, will sustain regular proceedings thereunder.<sup>8</sup>

**§ 104. Expulsion of Members of Subordinate Lodges of a Beneficiary Order.** — The subordinate lodges of a benefit society are not only social clubs, generally unincorporated, but are also constituent parts of the society of which the entity and head is an incorporated superior governing body. In considering the rights of such subordinate lodges and those of the society itself, in regard to the expulsion of members, this fact must be remembered. There

<sup>1</sup> *People v. Med. Soc.*, 24 Barb. 570.

<sup>2</sup> *People v. Medical Society, etc.*, 32 N. Y. 187.

<sup>3</sup> *Fuller v. Plainfield Academy*, 6 Conn. 532.

<sup>4</sup> *Erd. v. Bavarian, etc., Assn. (Mich.)*, 34 N. W. Rep. 555; 11 West. Rep. 171.

<sup>5</sup> *Allnutt v. High Court of Foresters (Mich.)*, 28 N. W. Rep. 802.

<sup>6</sup> *Durantaye v. Society St. Ignace*, 13 L. C. J. 1; 1869.

<sup>7</sup> See, however, *Pulford v. Fire Department*, 31 Mich. 458; and also following section.

<sup>8</sup> *Dickenson v. Chamber of Commerce, etc.*, 29 Wis. 45; *People v. Board of Trade*, 45 Ill. 112; *State v. Chamber of Commerce*, 20 Wis. 63; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *People v. St. George's Soc.*, 28 Mich. 261; *People v. Board of Trade*, 80 Ill. 134; *Sperry's Appeal (Pa.)*, 8 Cent. Rep. 215; 9 Atl. Rep. 478.

may be an expulsion from membership in the subordinate lodge for violation of the penal provisions of its laws, which generally carries expulsion from the society itself with it, and there may be a conditional expulsion, or suspension, for non-payment at the prescribed time of an assessment called by the superior incorporated body. In the first case the lodge may act as an independent body, in the latter as agent of the superior body, if any affirmative act is required to perfect the expulsion. Generally, if an assessment is not paid at the fixed time, the non-payment, by the laws of the order works, *ipso facto* a suspension, which in fact is an expulsion, although the member may be restored to membership by compliance with certain requirements of the laws of the order.<sup>1</sup> In a case in the St. Louis Court of Appeals,<sup>2</sup> Judge Seymour D. Thompson considered the subject of the expulsion of members of a subordinate lodge of a benefit society in a remarkably clear opinion. The lodge in that suit was a local lodge of the order of the Knights of Honor and under the control of a supreme lodge, by which assessments were levied, which the local lodge collected and remitted. The action was brought by the beneficiary of a deceased member, who had been expelled by the local lodge, to recover the amount named in his certificate of membership. The other facts sufficiently appear in the opinion from which we take the following extract, although it is to some extent a repetition of what we have already said: "The turning point in the case, therefore, is, whether James Mulroy was lawfully expelled from the order on the tenth of November, 1884. In determining this question, we must also lay out of view a number of considerations which have been pressed upon us in argument, which either have no bearing upon it, or which it is not necessary to consider. In the first place, we

<sup>1</sup> *Post*, § 385.

<sup>2</sup> *Mulroy v. Supreme Lodge, Knights of Honor*, 28 Mo. App. 463.

concede that there is a great array of judicial authority in favor of the proposition, that where members are expelled from religious societies, social clubs, benevolent societies, and other voluntary organizations, incorporated or unincorporated, the judicial courts will not interfere to reinstate them or to revise the judgment of expulsion, until the expelled member has exhausted all the remedies available to him within the organization itself, by appealing to a higher judicatory, provided by the rules of the society or otherwise.<sup>1</sup> But all the cases which so hold, either expressly state, or tacitly assume, that, in the action which the society took, and against which relief was sought, it acted within the scope of its powers, and in prosecuting their inquiries into the propriety of the action of such societies in the expulsion of members, or in the disposition of property or otherwise, courts have in general proceeded no further than to inquire whether the judicatory, provided by the laws of the society, which acted, had jurisdiction in the particular case.<sup>2</sup> It is true, that the English courts and the Supreme Judicial Court of Massachusetts have, in dealing with social clubs, and even with mutual benefit and other societies, gone beyond this, and have said that there must not only be a power to expel the member, but that the power must be exercised in good faith—in other words, these courts will interfere either in the case of a want of jurisdiction, or of fraud in its exercise.<sup>3</sup> It follows from

<sup>1</sup> *Karcher v. Supreme Lodge*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *La Fond v. Deems*, 81 N. Y. 507; *White v. Brownell*, 2 Daly, 329; *Harrington v. Workingmen's Benevolent Soc.*, 70 Ga. 340; *Loubat v. Leroy*, 15 Abb. N. C. 1.

<sup>2</sup> *State v. Farris*, 45 Mo. 183; *Commonwealth v. Green*, 4 Whart. 531; *Gibson v. Armstrong*, 7 B. Mon. 481; *Shannon v. Frost*, 3 B. Mon. 253; *Robertson v. Bullions*, 9 Barb. 134; *Harmon v. Dreher*, 1 Speer Eq. 87; *German Reformed Church v. Seibert*, 3 Pa. St. 282; *Den v. Pilling*, 4 Zab. (24 N. J. L.) 653; *Commonwealth v. Pike Ben. Soc.*, 8 Watts & S. 247; *Black & Whitesmith's Soc. v. Van Dyke*, 2 Whart. 309.

<sup>3</sup> *Karcher v. Supreme Lodge*, 137 Mass. 368; *Hopkinson v. Marquis*

the preceding statements that the judicial courts will not, on the one hand, declare the expulsion of a member to be invalid because of mere irregularities in the steps which have led up to it;<sup>1</sup> and that they will, on the other hand, set aside or disregard the expulsion of a member which has been had without notice to him and an opportunity to defend against the charges preferred;<sup>2</sup> or for offenses for which the society has no express power to expel, and which are not injurious to the society or contrary to law.<sup>3</sup> In early cases the doctrine has been announced that corporations have the same inherent power to expel members for reasonable causes, which they have to make by-laws, and that it is not necessary that the power should be found in the express language of their charters.<sup>4</sup> The offenses for which corporations possess the inherent power of removing an officer or corporator were thus classified by Lord Mansfield: '1. Such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise. 2. Such as are only against his oath and the duty of his office as a corporator, and amount to a breach of the tacit conditions annexed to his franchise or office. 3. The third sort of

of Exeter, L. R. 5 Eq. 63; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Inderwick v. Snell*, 2 Mac. & G. 216, 221; *Lambert v. Addison*, 46 L. T. (N. S.) 20; *Manby v. Life Ins. Soc.*, 29 Beavan, 439; 31 L. J. Ch. 94; *Dummer v. Corp. of Chippenham*, 14 Ves. 245, 252; *Blisset v. Daniel*, 10 Hare, 493.

<sup>1</sup> *Bouldin v. Alexander*, 15 Wall. 131; *Shannon v. Frost*, 3 B. Mon. 253; *German Ref. Ch. v. Seibert*, 3 Pa. St. 282; *State v. Farris*, 45 Mo. 183.

<sup>2</sup> *Com. v. Germ. Soc.*, 15 Pa. St. 251; *Dawkins v. Antrobus*, 17 Ch. D. 615; *Labouchere v. Earl of Wharnclyff*, 13 Ch. Div. 353; *Wachtel v. Noah Widows', etc., Soc.*, 84 N. Y. 28; *Rex v. Town of Liverpool*, 2 Burr. 732.

<sup>3</sup> *People v. Medical Soc.*, 32 N. Y. 187; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. 441; *Com. v. Germ. Soc.*, 15 Pa. St. 251; *Green v. African Soc.*, 1 Serg. & R. 254.

<sup>4</sup> *Bruce's Case*, 2 Strange, 819; *Rex v. Richardson*, 1 Burr. 519; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. 441.



offenses for which an officer or corporator may be displaced is of a mixed nature; as being an offense not only against the duty of an office, but also a matter indictable at common law.<sup>1</sup> Mutual benefit societies, such as the one under consideration are of a twofold character: 1. They are social organizations resembling religious societies and social clubs. 2. They are also mutual insurance companies. If the courts could deal with them in their character of mere social organizations, most of the foregoing principles would be applicable. In such a case it might be that the courts of the present day, following the doctrine laid down by Lord Mansfield and others, would hold that they possess an inherent power to expel members for offenses which injuriously affect the society, although such a power is not granted by their charter, or by the statute under which they are organized. It is not necessary for us, in this case, to express a definite opinion whether a court ought so to hold or not. We may say, for the purposes of this case, that, assuming the inherent power of expelling a member to exist, it cannot be exercised upon the mere ground that the member has uttered false and malicious charges against another member. It has been held, in a case where this inherent power of expulsion was conceded, that a by-law providing for the expulsion of a member for villifying another member of the society was void.<sup>2</sup> But in determining whether the expulsion of Mulroy was valid, so as to revoke his benefit certificate, we have to deal with this society primarily in its character of a mutual insurance association. In societies such as this, the members to whom benefit certificates are issued acquire property rights in the society of a very important character; and in dealing with these rights it is highly essential

<sup>1</sup> *Rex v. Richardson*, 1 Burr. 519; *Rex v. Town of Liverpool*, 2 Burr. 732.

<sup>2</sup> *Commonwealth v. St. Patrick's Ben. Soc.*, 2 Binn. 441.

that the courts should confine themselves strictly to the terms of the contract which the members have made among themselves.<sup>1</sup> It would be a very dangerous doctrine to apply to societies which, in addition to the character of social clubs, possess also the character of life insurance companies, and which undertake to insure the lives of their members for the benefit of their families, paying them a large sum in the event of the death of the member, the rule that they can expel their members, and thereby deprive their families of the benefits of this insurance, it may be, after the member has paid assessments for many years, and when, by reason of age or bad health, he has passed into such a state that new insurance upon his life cannot be procured — for causes not named in their constating instruments, or in the public statutes, but such as the members of the subordinate lodge may, in the excitement of the hour, deem a good ground of expulsion. We hold in this case, as we have held in other cases of this kind, that the rights of the beneficiary in such a certificate are strictly a matter of contract; that this contract is to be found in the terms of the certificate itself, in the statutes of the society, and, in the case of a society incorporated under the laws of this State, in the statutes of this State relating to such societies. Looking at these instruments we find no authority in them for the expulsion of a member of this society for the cause for which the lodge to which James Mulroy belonged undertook to expel him. The cause for which he was tried and expelled was, according to the record which was read in evidence, ‘making false and malicious charges against a member of this lodge,’ and in another place, ‘making false and malicious charges against Brother Tobin,’ without specifying to whom the false and malicious charges were made. The constitution and statutes of the society, which were put . . .

<sup>1</sup> Grand Lodge v. Elsner, 26 Mo. App. 108; Coleman v. Knights of Honor, 18 Mo. App. 189.

in evidence, contain no grant of authority to a subordinate lodge to expel a member for such a cause. Article X., of the 'constitution governing subordinate lodges' enumerates eleven distinct offenses for which a member may be suspended or expelled, but none of them resemble the charge upon which James Mulroy was expelled in this case. The one which comes nearest to it is section 6, which recites that 'a member who shall be guilty of immoral conduct shall, on conviction thereof, be suspended or expelled, as the lodge may determine.' But it would plainly be a misinterpretation of this provision to hold that it refers to the case of a member making false and malicious charges against another member. It manifestly refers to conduct involving the personal morals of the member, to such an extent as to render him unfit for fellowship with the other members. The succeeding article XI. relates entirely to trials and punishment. Then follows article XII., under which it would seem this prosecution and expulsion were had. Section one of this article reads: 'If a member shall make to *this lodge*, or to *its dictator*, any accusation against a member which shall prove to be false and malicious, he shall be suspended or expelled.' It is perceived that this section is a grant of authority to subordinate lodges to expel only in the case where a member shall make false and malicious accusations against another member, either to its lodge or to its dictator. It is not necessary for us to say whether or not such a regulation would be declared void as unreasonable. Although it is found in what is called the 'constitution governing subordinate lodges,' it is in the nature of a by-law; for the statute of this State under which this society is incorporated is its charter. But it nowhere appears in this record that James Mulroy was ever tried by his lodge, or expelled therefrom, for making false or malicious charges against a member, either to the lodge or to its dictator. So far as the record discloses, he was tried

§ 104a GOVERNMENT AND MEMBERSHIP: BY-LAWS.

and expelled for the mere offense of slandering a member, it may have been, for aught that appears, in another State, or even in a foreign country. It may have been while testifying as a witness in a court of justice, while making a communication as a client to his counsel, or upon some other occasion which in law rendered it absolutely privileged. To allow the rights of a member in a society, which is in the nature of a mutual life insurance company, to be forfeited for such a cause, by such of his associates as happen to compose a subordinate lodge or branch of the general society, would, we apprehend, be going further than any court has yet gone. It follows from these premises that the lodge to which James Mulroy belonged had no jurisdiction whatever to try or expel him upon the charge above named; that his expulsion was consequently null and void; that, being merely void, it was not incumbent upon him to take steps to have it reversed in a higher judicatory of the society; but that it left him clothed with the rights of membership, at least in respect of the mutual benefit fund of the society to the same extent as though it had not taken place.”

§ 104a. **Acquittal: Appeal.** — If a member of a society is once acquitted on a trial upon charges preferred against him, as, for example, by the failure of a resolution or motion for expulsion to pass, by reason of its not receiving the majority of votes required by the charter, or by-laws, he cannot be tried again for the same offense. A subsequent passage of the same resolution, or motion, by the requisite majority of votes is a nullity.<sup>1</sup> An appeal of a member of a subordinate lodge from a vote of expulsion does not abate by the death of such member during the pendency of the appeal;<sup>2</sup> if on such appeal the judgment

<sup>1</sup> *Commonwealth v. Guardians of the Poor*, 6 Serg. & R. 469.

<sup>2</sup> *Marck v. Supreme Lodge, K. of H.*, 29 Fed. Rep. 896; *Green v. Watkins*, 6 Wheat. 260.

of the lodge is reversed the beneficiary of the member is entitled to recover the benefit agreed to be paid upon the death.<sup>1</sup>

**§ 105. Courts will not Interfere if no Property Right is Involved.**—A distinction is to be made between cases in which the expulsion of members is for violation of the rules of the society, no property right being involved, in which case the courts decline jurisdiction,<sup>2</sup> and cases in which the expulsion is virtually a forfeiture of property rights.<sup>3</sup> A distinction is also always to be made between a formal expulsion for an offense on the one hand and on the other an *ipso facto*, or conditional suspension, for non-compliance with the terms of the contract of membership, *e.g.*, for non-payment at the agreed specified times of assessments or dues.<sup>4</sup>

**§ 106. Courts will not inquire into merits of expulsion.**—One of the earliest cases in the United States in which the right of a member of a society to resort to the courts after expulsion was considered is that of *Black and Whitesmiths' Society v. Van Dyke*,<sup>5</sup> where the court said: "Into the regularity of these proceedings, it is not permitted us to look. The sentence of the society, acting in a

<sup>1</sup> *Marck v. Supreme Lodge, etc., supra.*

<sup>2</sup> *People v. Board of Trade*, 80 Ill. 134; *State v. Oddfellows', etc.*, 8 Mo. App. 148; *Dawkins v. Antrobus*, 17 L. R. Ch. D. 615; 44 L. T. 557; *Rigby v. Connol*, 14 L. R. Ch. D. 482; *Hopkinson v. Marquis of Exeter* 37 L. J. Ch. 173; 5 L. R. Eq. 63. Also authorities next cited.

<sup>3</sup> *Pulford v. Fire Department*, 31 Mich. 458; *Otto v. Journeymen Tailor's, etc., Union (Cal.)*, 17 Pac. Rep. 217; *Mulroy v. K. of H. Supreme Lodge*, 28 Mo. App. 463; *Thompson v. Soc. Tammany*, 17 Hun, 305; *Bauer v. Sampson Lodge*, 102 Ind. 262; *White v. Brownell*, 2 Daly, 329; *Austin v. Searing*, 16 N. Y. 112; *Olery v. Brown*, 51 How. Pr. 92; *Supreme Council v. Garrigus*, 104 Ind. 133; *Schmidt v. A. Lincoln Lodge (Ky.)*, 2 S. W. Rep. 156. See *post*, § 108.

<sup>4</sup> See chap. XI., § 385, and *ante*, § 104.

<sup>5</sup> 2 Whart. 309; 30 Am. Dec. 263.

judicial capacity and with undoubted jurisdiction of the subject-matter, is not to be questioned collaterally, while it remains unreversed by superior authority. If the plaintiff has been expelled irregularly he has a remedy by *mandamus* to restore him; but neither by *mandamus* nor action, can the merits of his expulsion be re-examined. He stands convicted by the sentence of a tribunal of his own choice; which, like an award of arbitrators, concludes him." In a later case in the Supreme Court of the same State<sup>1</sup> it was further said: "The charter to the defendants below provides for the offense, directs the mode of proceeding and authorizes the society, on conviction of the member, to expel him. This has been done, after a hearing and trial, according to the mode prescribed; at least there is no allegation of the irregularity of the proceeding. Under these circumstances the sentence is conclusive on the merits, and cannot be inquired into collaterally either by *mandamus* or action, or in any other mode. It is like an award made by a tribunal of the party's own choosing; for he became a member under and subject to the articles and conditions of the charter, and, of course, to the provisions on this subject as well as others. The society acted judicially, and its sentence is conclusive, like that of any other judicial tribunal. The courts entertain a jurisdiction to preserve these tribunals in the line of order and to correct abuses, but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings." This doctrine has received general approval in this country and in England, as appears by a long list of adjudications, subject however to some important modifications, if not exceptions, where property rights are involved, which we will consider in course.<sup>2</sup> The court, if a property

<sup>1</sup> Commonwealth v. Pike Beneficial Soc., 8 Watts. & S. 247.

<sup>2</sup> Osceola Tribe v. Schmidt, 57 Md. 98; Sperry's Appeal (Pa.), 8 Cent. Rep. 115; 9 Atl. Rep. 468; Anacosta Tribe v. Murbach, 13 Md. 91; Farnsworth v. Storrs, 5 Cush. 412; Burton v. St. George's Society, 28 Mich. 261; Grosvenor v. United Society, etc., 118 Mass. 78; Woolsey v. Independent

right is involved, will, however, look so far into the case as to satisfy itself that there was not a capricious or arbitrary exercise of the power.<sup>1</sup>

§ 107. **When Injured Members can Resort to the Courts.**—It has been held in many cases that before the member can resort to the courts he must first exhaust the remedies provided by the society of which he is a member,<sup>2</sup> but a different rule prevails where property rights are involved. The courts are loth to adopt the rule that societies doing a life insurance business can expel a member for some infraction of a by-law regulating personal conduct and thereby cause him to forfeit his insurance for which he has perhaps paid for a long period, at a time too when possibly from ill health or other reasons he may not be able to replace the indemnity;<sup>3</sup> and, as was said by the Supreme Court of California:<sup>4</sup> “ Courts will interfere for the pur-

Order, etc., 61 Ia. 492; *Karcher v. Supreme Lodge*, 137 Mass. 368; *Loubat v. Leroy*, 15 Abb. N. C. 1; *White v. Brownell*, 4 Abb. Pr. (N. s.) 162; s. c. 2 Daly, 329; *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Olery v. Brown*, 51 How. Pr. 92; *Lafond v. Deems*, 8 Abb. N. C. 388; s. c. 81 N. Y. 507; *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Jones v. National, etc. Assn. (Ky.)*, 2 S. W. Rep., 447; *Hopkinson v. Marquis of Exeter*, L. R. 5 Eq. 63; *Dawkins v. Antrobus*, L. R. 17 Ch. D. 615, *affd.* 44 L. T. Rep. (N. s.) 557.

<sup>1</sup> *Hopkinson v. Marquis of Exeter*, 37 L. J. Ch. 173; 5 L. R. Eq. 63; *Richardson-Gardner v. Freemantle*, 24 L. T. (N. s.) 81; 19 W. R. 256; *Dawkins v. Antrobus*, 17 L. R. Ch. D. 615; 44 L. T. 557, 29 W. R. 511; *Otto v. Journeymen Tailors', etc. Union (Cal.)*, 17 Pac. Rep. 217.

<sup>2</sup> *Karcher v. Supreme Lodge, etc.*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Grosvenor v. United Society, etc.*, 118 Mass. 78; *White v. Brownell*, 4 Abb. Pr. (N. s.) 162; s. c. 2 Daly, 329; *Lafond v. Deems*, 8 Abb. N. C. 388; s. c. 81 N. Y. 508; *Poultney v. Bachmann*, 31 Hun, 49; *Carlen v. Drury*, 1 Ves. & B. 154; *Harrington v. Workington's Assn.*, 70 Ga. 340; *ante* § 94.

<sup>3</sup> *Austin v. Searing*, 16 N. Y. 112; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Supreme Council v. Garrigus*, 104 Ind. 133; *People v. Fire Dept.*, 31 Mich. 457; *Olery v. Brown*, 51 How. Pr. 92; *Mulroy v. Knights of Honor*, 28 Mo. App. 463.

<sup>4</sup> *Otto v. Journeymen Tailors', etc., Union*, 17 Pac. Rep. 217.

pose of protecting property rights of members of unincorporated associations in all proper cases, and, when they take jurisdiction, will follow and enforce, as far as applicable, the rules applying to incorporated bodies of the same character." If the lodge tribunal had no jurisdiction its sentence is a nullity. Although the action of such a tribunal according to its rules, on a question which it had authority to decide, honestly taken, after the requisite notice to the members, cannot be collaterally reviewed by the courts;<sup>1</sup> yet, if the action of the lodge be a usurpation; or without notice or authority, it cannot affect the legal rights or change the legal status of any one. "The obligation to appeal is not imposed when the judgment is void for want of jurisdiction. It may be likened to a judgment rendered by a court which has no jurisdiction of the subject-matter or the person. No appeal or writ of error is necessary to get rid of such a judgment; it is void in all courts and places."<sup>2</sup> And the duty of an expelled member to exhaust, by appeals or otherwise, all the remedies within the organization, arises only where the association is acting strictly within the scope of its powers.<sup>3</sup>

§ 108. **The Jurisdiction of Equity.**—In a late case before the Master of the Rolls in the Chancery Division,<sup>4</sup> the grounds of the interference of court of equity in matters of this kind were thus discussed: "The first question that I will consider is, what is the jurisdiction of a court of equity as regards interfering at the instance of a member of a society to prevent his being improperly expelled therefrom? I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the member of

<sup>1</sup> *Karcher v. Supreme Lodge, etc.*, 137 Mass. 368.

<sup>2</sup> *Hall v. Supreme Lodge, Knights of Honor*, U. S. Cir. Ct. E. D. Ark., 24 Fed. Rep. 450.

<sup>3</sup> *Mulroy v. Supreme Lodge<sup>1</sup> Knights of Honor*, 28 Mo. App. 463.

<sup>4</sup> *Rigby v. Connol*, 14 L. R. Ch. D. 482.



the society and of which he is unjustly deprived by such unlawful expulsion. There is no such jurisdiction that I am aware of reposed, in this country at least, in any of the Queen's courts to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together without any property in common at all. A dozen people may agree to meet and play whist at each other's houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternately at each other's houses, or at any place where there is a possibility of their meeting each other; but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere with such an association, if some of the members declined to associate with some of the others. That is to say, the courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy — in such cases no court of justice can interfere so long as there is no property the right to which is taken away from the person complaining. If that is the foundation of the jurisdiction, the plaintiff, if he can succeed at all, must succeed on the ground that some right of property to which he is entitled has been taken away from him. That this is the foundation of the interference of the courts as regards clubs I think is quite clear. If we look at the Lord Chancellor's judgment in the case of *In re St. James' Club*,<sup>1</sup> he

<sup>1</sup> 2 D. M. & G. 383; 16 Jur. 1075.

says this: ‘What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and, if the club was broken up while he was a member, he might file a bill to have its assets administered in this court, and he would be entitled to share in the furniture and effects of the club.’ So he puts it that the member has an interest in the assets. In the case of *Hopkinson v. Marquis of Exeter*,<sup>1</sup> Lord Romilly says this: ‘This is an application by the plaintiff asking a declaration that he is entitled to the enjoyment of the property and effects of the Conservative Club, and to participate in its rights, privileges and benefits, and also that the defendants, the committee of the club, may be restrained by injunction from excluding him therefrom.’ So that he starts with the enjoyment of property, and the subsequent cases have gone on the same ground.”<sup>2</sup>

§ 109. **The Remedy of Mandamus: What the Court will Consider.** — As a general rule, a member wrongfully expelled from a society, or when the proceedings are irregular, may be restored by *mandamus*, and this is the proper remedy.<sup>3</sup> However, the courts, in these actions or in applications to enjoin interference, will only examine to see if the proceedings were in accordance with the rules of the society, and not inherently against the principles of justice. The rule is thus laid down by the High Court of Appeal:<sup>4</sup> “The only question which a court can properly consider is whether the members of the club, under such circumstances, have acted *ultra vires* or not, and it seems to me the only questions which a court can properly entertain for that purpose are, whether anything has been done which is contrary to natural justice, although it is within the rules of

<sup>1</sup> L. R., 5 Eq. 63.

<sup>2</sup> *Ante*, § 105; *Van Houten v. Pine*, 36 N. J. Eq. 133, and note.

<sup>3</sup> See *post*, § 442.

<sup>4</sup> *Dawkins v. Antrobus*, 17 L. R. Ch. D. 630.

the club — in other words, whether the rules of the club are contrary to natural justice; secondly, whether a person who has not condoned the departure from them has been acted against contrary to the rules of the club; and thirdly, whether the decision of the club has been come to *bona fide* or not. Unless one of those charges can be made out by those who come before the court, the court has no power to interfere with what has been done.”<sup>1</sup>

§ 110. **Presumption of Regularity of Expulsion Proceedings.** — While ordinarily there is a presumption that there is fairness on the part of the fellow-members of a society in proceedings for expulsion of another,<sup>2</sup> and, while, if jurisdiction be shown, courts will also presume that the proceedings were regular, and will look at justice rather than form,<sup>3</sup> yet there are to be no presumptions in the case of forfeiture of property, or other important rights,<sup>4</sup> because the law is opposed to sharp, summary proceedings involving forfeitures.<sup>5</sup>

§ 111. **Withdrawal of Member of Voluntary Association.** — Unless the compact between the members of a voluntary association provide to the contrary, a member may withdraw from it at any time. “The entering into it, the remaining in it, the performance of duties incumbent

<sup>1</sup> *Society v. Commonwealth*, 52 Pa. St. 125; *Commonwealth v. German Soc.*, etc., 15 Pa. St. 251; *Otto v. Journeymen Tailors'*, etc., Union (Cal.), 17 Pac. Rep. 217; *Schweiger v. Society*, etc., 13 Phila. 113; *Sibley v. Carteret Club*, 40 N. J. L. 295; *People v. N. Y. Beh. Assn.*, 3 Hun, 361; *People v. St. Franciscus*, etc., 24 How. Pr. 216; *People v. St. George*, etc., 28 Mich. 261; *Commonwealth v. Guardians of Poor*, etc., 6 Serg. & R. 469; *People v. Fire Dept.*, 31 Mich. 458; *People v. Medical Soc. Erie*, 24 Barb. 570. See *ante*, § 106.

<sup>2</sup> *Bachmann v. N. Y. Arbeiter*, etc., 64 How. Pr. 442; *Harmon v. Dreher*, 1 Speer Eq. 87; *Shannon v. Frost*, 3 B. Mon. 253.

<sup>3</sup> *Burton v. St. George Soc.*, 28 Mich. 261.

<sup>4</sup> *People v. Fire Department*, 31 Mich. 458.

<sup>5</sup> *People v. Medical Society*, 32 N. Y. 187.

upon the member, by reason of his membership, are purely voluntary." Consequently the member may withdraw when he pleases without the consent of the association. But by so doing he cannot avoid any obligations incurred by him to the association, nor can it, after such withdrawal, impose any new obligations upon him. Nor is the association estopped from asserting that the member has voluntarily withdrawn from membership, although it has denied his right to voluntarily withdraw, unless, in so doing, it has led the member to believe, to his prejudice, that he is still a member.<sup>1</sup>

**§ 112. Personal Liability of Members of Unincorporated Society.**—As to the personal liability of members of a voluntary association, for, if incorporated, the identity of the members of the society is for general purposes merged in the entity of the corporation, a distinction is made between differences arising between members themselves, or internal controversy, and questions between a creditor on the one hand and the body, or one or more members, on the other, or external controversies. "The courts have always distinguished between the principles applicable to the two cases of controversies, and have, in the absence of a better guide, leaned, in the one class of cases, toward the rules offered by corporations, and often in the other class of cases, toward those offered by the law of partnership, or agency."<sup>2</sup> The general principle has thus been laid down:<sup>3</sup> "Certain societies, as clubs, which are not constituted for any purpose of profit, are exposed to liabilities similar in many respects to those of a partnership. All parties who take an active part in working out a project, who attend meetings at which resolutions are made

<sup>1</sup> *Borgraefe v. Knights of Honor*, 26 Mo. App. 218.

<sup>2</sup> *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300, (see note by reporter.)

<sup>3</sup> *Ferris v. Thaw*, 5 Mo. App. 279, affirmed, 72 Mo. 446.

or orders given for the supply of goods, in furtherance of a joint undertaking, are, in general, jointly responsible. The act of a secretary of a voluntary association will not bind the board, if not authorized; but it will bind any members who were present at a meeting, and concurred in giving authority to the secretary. Where members of a voluntary association authorize its officers to engage in a particular transaction in the name of the society, as they do not bind the society as a body, or give to persons interested a tangible third party against whom they can proceed, they are themselves the only persons that can be sued, and are, in fact, principals in the transaction.<sup>1</sup> If the appellants, members of an organized club or association of gentlemen, expressly authorized the presiding officer of the association to execute a note in the name of the club, or in any other name whatever, expressive of an association of men, and to use this note when made, for the purpose of purchasing bonds to be owned by and used for the club of which they were members, and these bonds were purchased and the note executed in the name of the club, whatever may be said as to the liability of the other members of the association, we cannot see on what principle it can be denied that those expressly sanctioning or ratifying this use of the club's name are liable upon the note to the person who advanced the money. It is not necessary to invoke the doctrine of partnership, perhaps; yet as to this particular transaction these men became partners, though not partners in trade, and however distinct as to other matters. And if they choose to assume a common name, under that name they will, each and every one, be liable as if the name signed to the note was the individual name of each man; and

<sup>1</sup> *Heath v. Goslin*, 80 Mo. 310; *Lewis v. Tilton*, 64 Ia. 220; *s. c.* 52 *Am. Rep.* 436; *Ray v. Powell*, 134 *Mass.* 22; *Newell v. Borden*, 128 *Mass.* 31; *Doubleday v. Muskett*, 7 *Bing.* 110; *Blakely v. Bennecke*, 59 *Mo.* 193; *Horsely v. Bell*, 1 *Brown Ch.* 101; *Cullen v. Duke Queensbury*, 1 *Brown Ch.* 101.

if they employ an agent's hand to write that name, it is as if each man himself had held the pen. If, on the maturity of this note, it was by express authorization or sanction of these several men, renewed by another note, executed in the name of the club by its presiding officer, this note also would be the note, not of the agent, but of all those who had sanctioned this use of the club name, and for the purposes of this transaction adopted it as their own. The mere name is nothing; its only office is that of identification. If Smith choose to call himself Snooks, and to make a contract by the name of Snooks, he binds himself as effectually as if he had signed the name of Smith.<sup>1</sup> If the appellants authorized Thaw to execute a promissory note, to be used to purchase property for their purposes, and told him to execute it in the name of the lodge, it is manifest that they intended to enter into a contract by that name. They did not mean that Thaw alone should be bound, for Thaw could bind himself without any authority from them, and in his own proper name; they could not by their act bind the lodge, for it was not a corporate body; nor could they bind the individual members of the lodge, for whom they were not authorized to act. They were themselves the principals in the transactions, if they directed or sanctioned the making and renewal of the note; and if the money was obtained on this note, and received by the lodge of which they were members, they are personally liable on the just principles of the common law." In another case, where an action had been brought to charge the members of a campaign committee<sup>2</sup> the court said: "Associations and clubs, the objects of which are social or political and not for purposes of trade or profit, are not partnerships, and pecuniary liability can be fastened upon the individual members of such associations only by reason

<sup>1</sup> Snook's Petition, 2 Hilt. 575.

<sup>2</sup> *Richmond v. Judy*, 6 Mo. App. 467.

of the acts of such individuals or of their agents; and the agency must be made out, — none is implied from the mere fact of association.<sup>1</sup> \* \* \* If the work was done with the previous concurrence or subsequent approbation of defendants, they and all the members of the club who stood in the same situation were liable to pay for the goods if the credit was given to the members of the club. \* \* \* If the plaintiff had trusted solely to the state of the funds, and this had been shown, the members of the committee could not have been liable unless the funds were collected; but if the credit was given to the members of the committee, such members as were aware of the dealing and authorized or sanctioned it are undoubtedly liable. So far as the evidence of agency goes, a course of dealing may amount to proof of original authority. The fact that defendants, when the bill was presented to them, recognized it as correct, together with the publicity of the work, go to show that defendants knew that the work was being ordered in the name of the committee of which they were members, especially as the work done was so clearly in furtherance of the object for which the committee was organized. The evidence of ratification, even though doubtful and susceptible of different interpretations, is properly submitted to a jury; and slight circumstances and small matters are sometimes sufficient to raise a presumption of ratification. It may further be said that though a part of the members of a voluntary organization cannot, as a general rule, bind the others without their consent before the act which it is claimed binds them is done, or they have ratified it and adopted it with full knowledge of all the facts, yet there are cases, as is said in *Sizer v. Daniels*,<sup>2</sup> in which the ob-

<sup>1</sup> *Bailey v. Macauley*, 19 L. J. Q. B. 73; *Wood v. Finch*, 2 Fost. & Fin. 447; *Delaunay v. Strickland*, 2 Stark. 416; *Sizer v. Daniels*, 66 Barb. 426; *Luckombe v. Ashton*, 2 Fost. & Fin. 707; *Fleming v. Hector*, 2 M. & W. 172.

<sup>2</sup> 66 Barb. 426.

jects for which the association is organized are so clear, and the acts done so essentially necessary to the furtherance of that object, that all will be presumptively bound by them without evidence of consent or ratification. \* \* \* The question is purely one of agency.”<sup>1</sup> Loss, before the record had been made up, of the informal minutes of a meeting of a voluntary association, where an act was authorized, does not preclude the plaintiff, in an action against the members of the society for work and materials furnished in fitting up its meeting room, from showing by oral evidence that such a vote was passed.<sup>2</sup>

**§ 113. Personal Liability of Members, how Avoided.** — If a member of an unincorporated society wishes to avoid responsibility for debts which it is likely to incur by withdrawal he should give notice to the public;<sup>3</sup> but if obligations have already been incurred he cannot avoid any liability by withdrawing from membership.<sup>4</sup>

**§ 114. Individual Liability for Sick or Funeral Benefits.** — It has often been attempted to hold the members of a lodge liable personally for the promised benefit in time of sickness. It may be a question of construction in each particular case whether the members are personally liable

<sup>1</sup> *Ridgley v. Dobson*, 3 Watts & S. 118; *Sproat v. Porter*, 9 Mass. 300; *Fleming v. Hector*, 2 M. & W. 172; *s. c.* 2 Gale, 180; *McMahon v. Rauhr*, 47 N. Y. 67; *Devoss v. Gray*, 22 Ohio St. 159; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Todd v. Emly*, 7 M. & W. 427; *In re St. James Club*, 2 D. G. M. & G. 383; *Caldicott v. Griffiths*, 8 Exch. 898; *Babb & Reed*, 5 Rawle, 151; *Leech v. Harris*, 2 Brewst. 571; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300 and note; *Gorman v. Russell*, 14 Cal. 537; *Heath v. Goslin*, 80 Mo. 310; *Volger v. Ray*, 131 Mass. 439; *Newell v. Borden*, 128 Mass. 31. See *ante*, § 27, *et seq.*

<sup>2</sup> *Newell v. Borden*, 128 Mass. 31.

<sup>3</sup> *Park v. Spaulding*, 10 Hun, 128.

<sup>4</sup> *Ante*, §§ 111, 112.



or not. In at least one case, that of a lodge of the order of Chosen Friends,<sup>1</sup> the members were held personally liable; but the better rule seems generally to be that laid down by the Supreme Court of Massachusetts where it was sought to personally charge the members of a lodge of Odd-fellows for a death benefit. The court held in that case,<sup>2</sup> that under the constitution and laws of the lodge, the credit was given to the fund created by the joint contributions of the members who only agreed to pay these certain and stated contributions or dues.

§ 115. **Liability of Persons Contracting in Name of Voluntary Association.** — Generally, whenever any person, or persons, contract in the name of an unincorporated organization, he or they are personally liable for the obligations so incurred. In such a case the Supreme Court of Iowa said:<sup>3</sup> “It is said these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should be held liable, and that it is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence.”<sup>4</sup> The question, however, would seem to be in all cases an inquiry of to whom credit was given.<sup>5</sup>

<sup>1</sup> *Pritchett v. Schafer*, 2 W. N. C. 317.

<sup>2</sup> *Payne v. Snow*, 12 Cush. 443; 59 Am. Dec. 203.

<sup>3</sup> *Lewis v. Tilton*, 64 Ia. 220; 52 Am. Rep. 436.

<sup>4</sup> *Ash v. Guie*, 97 Pa. St. 493; *Fredendall v. Taylor*, 26 Wis. 286; *ante*, § 31.

<sup>5</sup> *Ante*, §§ 35, 36.

§ 116. **Summary of Principles Stated in this Chapter.** — From the cases hereinbefore cited we deduce the following general rules:

1. Members of all associations, incorporated or voluntary, are bound by the charter or articles of association and by-laws, lawfully adopted in accordance therewith, provided such by-laws do not contravene the charter, or common or statute law and are not unreasonable. This reasonableness will be determined by the courts, they being governed by considerations growing out of the nature of the society and by the fact whether or not property rights are involved.

2. In seeking to obtain rights under the by-laws or rules of a society the member must proceed as therein required and generally exhaust the remedies established by the by-laws and rules before applying to the courts for relief. If no tribunal is established by the rules he may at once resort to the courts. In the case, however, of property rights, it has been held that he may or may not leave the determination to the tribunals of the order; he may sue at once or he may consent to an adjudication by the society, in which latter case he is bound as by an arbitration, provided no principles of natural justice have been violated by the tribunal and the proceedings are regular.

3. All voluntary associations or incorporated societies may expel a member as provided in their rules, or for violation of his duty as a corporator, or if he becomes infamous, but, if property rights are involved, or if the society be incorporated, the courts will judge of the reasonableness and validity of such rules and will be reluctant to enforce or permit forfeiture of important rights. In any event the proceedings by the society must be in accordance with its rules; notice must be given to the accused, and he afforded an opportunity to explain his conduct and defend himself, and then if the proceedings are regular and fair,

or if no property right is involved, the courts will not interfere; if, however, the rules are illegal or unreasonable, or the proceedings irregular the court will enjoin the procedure, or any interference with the rights of the member, or if he has been wrongfully expelled, restore him by *mandamus*, provided some property right attaches to membership.

4. In regard to the jurisdiction of superior over inferior bodies in an order, or society, the courts will not enforce a forfeiture of the property rights of the latter, but may even interfere to prevent it. In such cases considerations of public policy will always prevail. In mere matters of discipline, where no property right is involved, the decision of the superior organization, if regularly rendered and not inherently unjust, will be regarded as final.

5. Where subordinate organizations have a conventional as well as a State charter either may be forfeited or taken away without affecting the other. But in no case can a State charter be impaired or taken away except by direct action of the State. Forfeiture of the conventional charter of a society incorporated by the State will not divest its property, nor can the property be affected by a secession of part of its members. Even if unincorporated, the majority of a society have generally the right to cut loose from a superior governing body, and the minority have no redress if the property is used for the general purposes for which it was acquired.

6. In regard to personal liability of the member for the debts or obligations of the society, the rule is that liabilities can only be fastened on him by reason of his own acts, or by reason of the acts of his agents; and the agency must be made out of the person who relies on it for none is implied by the mere fact of association.

## CHAPTER IV.

### OFFICERS AND AGENTS.

117. Associations and Corporations Act through Agents.
118. Subordinate Lodges both Principals and Agents.
119. General Principles of Law of Agency.
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121. Officers and Committees are Agents.
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145. Officers and Committees of Benefit Societies are Special Agents.
146. Benefit Societies in Law are Mutual Life Insurance Societies.
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- § 149. Have Subordinate Lodges the Characteristics of Ordinary Life Insurance Agents?
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159. How far Knowledge of Agent binds Principal.
160. Notice to Agent.

§ 117. Associations and Corporations Act Through Agents. — It stands to reason that all associations of individuals, whether endowed with corporate powers and privileges, or unincorporated, must of necessity do most acts through the intervention of agents, for the members can act as a body upon comparatively few occasions. The liability of the associated persons, either as an association or individuals, must usually, if not always, be determined by an application of the general principles of the law of agency, modified sometimes by the circumstances of each particular case.<sup>1</sup> Benefit societies have certain peculiar and individual characteristics: in some cases their undertakings resemble the contracts of life insurance companies, at other times their engagements are only such as arise in the ordinary business of clubs or associations for social or commercial objects. The one class of contracts are of insurance and are similar in many respects to those of ordinary life insurance concerns, they are consequent to and generally arise out of the membership and as incident thereto; the second class may be made up of all other undertakings and

<sup>1</sup> *Ante*, § 49.

agreements and are not different from those of individuals or of other corporations.

**§ 118. Subordinate Lodges both Principals and Agents.**—The various lodges, or subordinate and local divisions or societies, of a general and more extended organization, have in their transactions a dual nature. When they furnish benefits to their members in times of sickness, and when dealing with them in regard to local matters, they are principals; but when they simply receive members under the direction and supervision of a superior body, which is generally incorporated, and by whom the contract of indemnity, or benefit, is entered into, or when they collect assessments for this superior, they are agents of such superior.<sup>1</sup>

**§ 119. General Principles of Law of Agency.**—To determine the rights and liabilities of these corporations, or associations, their members or their agents, involves a consideration of the whole law of agency. It is not necessary, however, to here undertake so arduous a task nor would it be to the advantage of the reader. There are, it is true, peculiar contingencies and circumstances which we may consider with profit, but it must always be remembered that the contracts of all individuals, corporations or associations entered into through agents are to be construed and the liability determined by an application of the general principles of the law of agency and to the treatises upon that subject the reader must be referred.

**§ 120. When General Engagements of Clubs are Binding on their Members.**—In regard to the general engagements of associations or clubs, which are contracted through agents, the rule is that they are binding upon all the members if the rules and constitution of the organization either

<sup>1</sup> *Post*, §§ 144, 146.

expressly or impliedly authorize the acts, or if the objects of the association are so clear and the acts done so essentially necessary to the furtherance of that object that all the members will be presumptively bound by such acts without evidence of consent or ratification.<sup>1</sup> Otherwise only those members who have either authorized the act or ratified it when done will be bound.<sup>2</sup>

§ 121. **Officers and Committees are Special Agents.** — The officers and committees of an unincorporated society, as well as those of an incorporated organization, are the agents of the body of members for certain specific purposes and are therefore to be deemed special agents, whose commission and authority is to be found in the rules and articles of association or in the special orders appointing them. As is said in *Fleming v. Hector*:<sup>3</sup> “It is therefore a question here how far the committee, who are to conduct the affairs of this club as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large; and that depends on the constitution of the club, which is to be found in its own rules.” In another case,<sup>4</sup> it was said that the constitution of the society and its laws agreed upon by the members, which contain all the stipulations of the parties, form the law which should govern. The members have established a law themselves.<sup>5</sup>

<sup>1</sup> *Fleming v. Hector*, 2 Mees. & W. 172; *Todd v. Emly*, 8 Mees. & W. 505; *Sizer v. Daniels*, 66 Barb. 426; *Richmond v. Judy*, 6 Mo. App. 465.

<sup>2</sup> Cases *supra*; *McMahon v. Rauhr*, 47 N. Y. 67; *Lindley on Partnership*, p. 57; *Beaumont v. Meredith*, 3 Ves. & B. 180; *Ferris v. Thaw*, 5 Mo. App. 279; 72 Mo. 450; *Eichbaum v. Irons*, 6 Watts & S. 67; *Devoss v. Gray*, 22 Ohio St. 159; *Sproat v. Porter*, 9 Mass. 300; *Babb v. Reed*, 5 Rawle, 151; *Ash v. Guie*, 97 Pa. St. 493; *Bishop on Contracts*, § 1,174: See *ante*, § 112.

<sup>3</sup> 2 Mees. v. W. 179.

<sup>4</sup> *Leech v. Harris*, 2 Brewst. 571.

<sup>5</sup> *Cockerell v. Aucompte*, 26 L. J. C. P. 194; 2 C. B. (N. S.) 440; 3 Jur. (N. S.) 844; *White v. Brownell*, 2 Daly, 329.

**§ 122. Presumptions of Law Concerning Members. —** The presumption is that each person upon becoming a member of an association consents that it shall be represented by such officers and agents as are reasonably necessary for the transaction of its business, and that in the absence of express provisions in the charter limiting their powers, they shall possess the powers and perform the duties ordinarily possessed and performed by such officers and agents; and such member is bound by the rules of the company which he is presumed to know.<sup>1</sup>

**§ 123. When Judicial Powers cannot be Conferred. —** But an association cannot, by its constitution or by-laws, confer judicial powers upon its officers or committees so as to enable such officers, or committees (without voluntary submission to their authority on the part of lodges or members), to adjudge a forfeiture of property rights, or to deprive lodges or members of their property, or to arbitrarily take property away from one set of members and give it to another set. This is on the ground that the creation of judicial tribunals is one of the functions of sovereign power and because to allow such powers to be conferred would be contrary to public policy, just as agreements to refer future controversies to arbitration cannot be enforced. An adjudication of these officers, or committees, which has this effect of forfeiture of property, or property rights, is not good either as an award or as a judgment.<sup>2</sup> But this must not be understood to mean that the officers of grand or supreme lodges cannot (if no property rights are involved and the inferior lodge is not incorporated in a different State), acting in accordance with the laws of the

<sup>1</sup> Protection Life Ins. Co. v. Foote, 79 Ill. 361.

<sup>2</sup> Austin v. Searing, 16 N. Y. 112; 69 Am. Dec. 665; Bauer v. Sampson Lodge, 102 Ind. 262; Supreme Council v. Garrigus, 104 Ind. 133; Schmidt v. A. Lincoln Lodge (Ky.), 2 S. W. Rep. 156; see Bouvier, L. D. tit. submission; also *ante*, §§ 71, 72.



association, and by way of discipline, deprive local, or subordinate lodges of their fraternal charters;<sup>1</sup> or that subordinate lodges cannot provide in their laws that no member shall be entitled to benefits for sickness or otherwise, unless certain officers, or a committee, shall determine the amount and extent of the same,<sup>2</sup> or, possibly, the right.<sup>3</sup> Or that lodges may not, by their laws, provide that if a member does not pay an assessment, or his dues, within a specified time he shall, by such failure, forfeit his membership, or be subject to expulsion;<sup>4</sup> or that lodges may not, by their laws, and under the restrictions and limitations hereinbefore stated, provide for tribunals, or committees, by which members charged with certain offenses may be tried, and, if found guilty, expelled from membership.<sup>5</sup>

§ 124. **Power of Amotion of Officers, who has.** — The power of removing or suspending officers of an association, or corporation, resides in the body at large and cannot be exercised by other officers unless the articles of association expressly confer the power.<sup>6</sup>

§ 125. **Authority of Officers and Agents.** — Where the officers or directors of an association had no power to do an act, and such act was done by the president, it was held that the directors could not ratify it.<sup>7</sup> A course of dealing may be sufficient to authorize an inference of authority, although the officer had not in fact any real authority;<sup>8</sup> and

<sup>1</sup> *State v. Odd-fellows' Grand Lodge*, 8 Mo. App. 148.

<sup>2</sup> *Ante*, § 92 *et seq.*

<sup>3</sup> *Rood v. Railway, etc., Mut. Ben. Assn.*, 31 Fed. Rep. 62.

<sup>4</sup> *Post*, §§ 385, 388.

<sup>5</sup> *Ante*, § 95 *et seq.*

<sup>6</sup> *Potter v. Search*, 7 Phila. 443; *Lowry v. Stotzer*, 7 Phila. 397; *Neall v. Hill*, 16 Cal. 145.

<sup>7</sup> *Crum's Appeal*, 66 Pa. St. 474.

<sup>8</sup> *Union, etc., Mining Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 248; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Richmond v. Judy*, 6 Mo. App. 465.

authority may be inferred from facts and circumstances;<sup>1</sup> for usage often interprets authority;<sup>2</sup> and ratification also may be implied from apparent consent, acquiescence or acts and circumstances.<sup>3</sup> In general, a party dealing with any kind of an agent is bound to ascertain his authority; as has been said: <sup>4</sup> “He is put on inquiry by the very fact that he is negotiating with an agent and is bound to ascertain whether he can bind his principal in the transaction which he purports to carry on in his behalf.”<sup>5</sup> For whatever purpose an agent is constituted, it is always understood that he shall have authority to do all necessary and usual acts incident to the nature of the business which he is constituted to transact.<sup>6</sup> “The principle, which pervades all cases of agency, whether it be a general or a special agency, is this,” says Story.<sup>7</sup> “The principal is bound by all acts of his agent, within the scope of the authority which he holds him out to the world to possess; although he may have given him more limited private instructions, unknown to the persons dealing with him. And this is founded on the doctrine, that where one of two persons must suffer by the act of a third person. he who has held that person out as worthy of trust and confidence, and having authority in that matter, shall be bound by it.. It will at once be perceived, this doctrine is equally applicable to all cases of agency, whether it be the case of a general, or of a special agency. When I hold out to the public a person as my agent in all my business and employment, he is deemed my general agent; and all acts done within the scope of that business bind me, not-

<sup>1</sup> *Dougherty v. Hunter*, 54 Pa. St. 380; *Northern Cent. R. Co. v. Bastian*, 15 Md. 494; *Olcott v. Tioga R. Co.*, 40 Barb. 179.

<sup>2</sup> Whart. on Ag., § 134; Story on Ag., § 95 *et seq.*

<sup>3</sup> Story on Ag., § 253 *et seq.*

<sup>4</sup> *Harrison v. City Fire Ins. Co.*, 9 Allen, 233.

<sup>5</sup> Story on Ag., § 58 and note.

<sup>6</sup> Story on Ag., chap. VI., § 57 *et seq.*

<sup>7</sup> Agency, § 127, note.

withstanding I have privately limited his authority by special instructions. Why? Because he is externally clothed with an unlimited authority over the subject-matter, and third persons might otherwise be defrauded by his acts. In such a case, he is not less a general agent as to third persons, than if he had received no private limitations of his authority. As between himself and his principal, his authority is not general, but *quoad hoc* is limited. In the same case, if the principal had privately revoked his whole authority, he would still be bound. So, if he had privately limited the authority to a single act in the same business (and he would accordingly be, between himself and his principal, a special agent), still the principal would be bound. Precisely the same rule applies to a special agency. \* \* \* In the case of a general agency, the principal holds out the agent to the public as having unlimited authority as to all his business. In the case of a special agency, like that above stated, the principal holds out the agent to the public, as having unlimited authority as to a particular act, subject or purchase. In each case, therefore, the same general principle applies." The same author continues: <sup>1</sup> "But where the agency is not held out by the principal, by any acts or declarations, or implications, to be general in regard to the particular act or business, it must from necessity be construed according to its real nature and extent; and the other party must act at his own peril, and is bound to inquire into the nature and extent of the authority actually conferred."

§ 126. **Agents of Corporations.** — The rule in regard to corporations is not different from that applied to persons: "The powers possessed by the various agents of a corporation may be limited by the terms of their appointment, or by custom; but the ultimate source of their authority is

<sup>1</sup> Story on Ag., § 133.

always the agreement of the shareholders expressed in their charter or articles of association. It follows, therefore, that if an act is in excess of the chartered purposes of a corporation, it will always be outside of the powers delegated to the company's agents, as well as in excess of the corporate powers which the company is authorized by law to exercise. The general rule, that a contract made by an agent of a corporation in excess of his powers does not bind the company, applies with peculiar force to a contract which is in excess of the charter itself. For a person dealing with a corporation must, at his peril, take notice of the terms of its charter, and of the fact that acts in excess of the charter are necessarily in excess of the authority of the agent performing them. \* \* \* It is a settled rule, that a person who deals with a corporation must, at his peril, take notice of its charter or articles of association. It follows, therefore, that so far as the authority of an agent of a corporation is defined by its charter or articles of association, the scope of the agent's powers must always be considered as disclosed."<sup>1</sup>

**§ 127. Officers of Corporation are Special Agents.**—Officers of a corporation are special and not general agents; they have no power to bind a corporation except within the limits prescribed by the charter and by-laws. The principle, that persons dealing with the officers of a corporation are charged with notice of the authority conferred upon them, and of the limitations and restrictions upon such authority contained in the charter is too well established to require to be supported by a citation of authorities.<sup>2</sup> But this rule is qualified by the statement that if a corporation either elects an officer or appoints an agent of a class, which,

<sup>1</sup> Morawetz on Corp., §§ 580, 591; *post*, § 130.

<sup>2</sup> *Adriance v. Roome*, 52 Barb. 399; *Alexander v. Cauldwell*, 83 N. Y. 480; *De Bost v. Albert Palmer Co.*, 35 Hun, 386; *Rice v. Peninsula Club*, 52 Mich. 87.

according to general custom, have certain functions and powers, it will be bound by his acts within the scope of authority usually exercised by such class, although his powers are limited by the by-laws.<sup>1</sup> The scope of the agent's or officer's authority may be established by "proofs of the course of business between the parties themselves; by the usages and practice which the company has permitted to grow up in its business, and by the knowledge which the board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation."<sup>2</sup>

**§ 128. Agent Contracting in Name of Irresponsible Principal.** — Generally, an agent, contracting in the name of a foreign or irresponsible principal, or one incapable of contracting, is held personally because the law presumes that he intended to bind himself or that credit was given to him. So, if an agent contracts in the name of a voluntary association having no legal entity, he is bound, although all the members who have consented to the act or ratified it afterwards are also bound.<sup>3</sup> "But," as Mr. Story in his commentaries on agency<sup>4</sup> says, "although it is thus true that persons, contracting as agents, are ordinarily held personally responsible, where there is no other responsible

<sup>1</sup> *Minor v. Mechanics' Bank*, 1 Pet. 46; *Fay v. Noble*, 12 Cush. 1; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 318; *Smith v. Smith*, 62 Ill. 493; *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67.

<sup>2</sup> *Mining Co. v. Anglo Californian Bank*, 104 U. S. 192; *Lee v. Pittsburgh Coal, etc., Co.*, 56 How. Pr. 376; *Phillips v. Campbell*, 43 N. Y. 271; *Morawetz on Corp.*, § 509.

<sup>3</sup> *Doubleday v. Muskett*, 7 Bing. 110; *Blakely v. Bennecke*, 59 Mo. 195; *Heath v. Goslin*, 80 Mo. 310; *Horsley v. Bell*, 1 Brown Ch. 101; *Lewis v. Tilton*, 64 Ia. 220; 52 Am. Rep. 436; *Burls v. Smith*, 7 Bing. 704; *Ridgley v. Dobson*, 3 Watts & S. 118; *Cullen v. Duke of Queensbury*, 1 Brown Ch. 101; *Gray v. Raper*, L. R. 1 C. P. 694.

<sup>4</sup> § 287.

principal to whom resort can be had; yet, the doctrine is not without some qualifications and exceptions, as indeed the words, ‘ordinarily held,’ would lead one naturally to infer. For, independent of the cases already suggested, where the contract is, or may be treated as a nullity, on account of its inherent infirmity or defective mode of execution, other cases may exist, in which it is well known to both of the contracting parties, that there exists no authority in the agent to bind other persons for whom he is acting, or that there is no other responsible principal; and yet, the other contracting party may be content to deal with the agent, not upon his personal credit, or personal responsibility, but in the perfect faith and confidence that such contracting party will be repaid and indemnified by the persons who feel the same interest in the subject-matter of the contract, even though there may be no legal obligation in the case.” The question generally is, “to whom is the credit knowingly given, according to the understanding of both parties?” “The law in all these cases, pronounces the same decision; that he to whom the credit is knowingly and exclusively given, is the proper person who incurs liability whether he be the principal or the agent.”<sup>1</sup>

**§ 129. Agent Acting in Excess of his Authority.**—Whenever an agent who contracts for another party, whether a corporation or natural person, exceeds his authority, he is personally liable, unless his acts be afterwards adopted or ratified by the supposed principal;<sup>2</sup> and he may be sued either for breach of warranty or deceit,<sup>3</sup> but the agent will not be liable if the other contracting party have the same opportunities for knowledge as the agent.<sup>4</sup>

<sup>1</sup> Story on Ag., § 288; Whart. on Ag., §§ 507, 508, 509; *ante*, § 115.

<sup>2</sup> Ang. & Ames on Corp., § 303; Whart. on Ag., § 524.

<sup>3</sup> Whart. on Ag., § 524.

<sup>4</sup> Whart. on Ag., § 531.

§ 130. **Charter or Articles of Association Fountain of Authority of Officers, Agents and Committees.** — The affairs of all corporations and societies must be managed by agents through whom all their business is transacted, and, whether these agents be called officers, directors or committees, they are, nevertheless, agents, and the general rules of agency apply. The articles of association, or charter, is the fountain of authority defining and limiting their duties and powers, and beyond these definite powers, they cannot go, although in the case of executed contracts, the company is, upon principles analogous to those of estoppel, sometimes debarred from asserting this defense, when this authority has been exceeded. The society is bound by acts done within the apparent scope of the agent's authority and such as are usually performed by agents of a similar class in that particular course of business.<sup>1</sup> It follows that officers, directors and committees may do all such acts as are within the scope of their apparent authority and usually incident to their offices. This rule, however, must be taken with some degree of allowance, for much will depend upon the special circumstances of each case.<sup>2</sup>

§ 131. **Fiduciary Relation of Officers and Directors.** — The general rules must also be held to apply, in all cases, that, while directors and other officers have a wide range of discretionary authority, each one sustains a fiduciary relation to the members of the organization, and the utmost good faith is required of him. "He falls, therefore, within the great rule by which equity requires that confidence shall not be abused by the party in whom it is reposed, and which it enforces by imposing a disability, either partial or complete, upon the party intrusted to deal, on his own behalf, in respect to any matter involved in such confidence."<sup>3</sup> The

<sup>1</sup> Morawetz on Corp., § 587 *et seq.*

<sup>2</sup> *Ante*, § 126.

<sup>3</sup> *Hoyle v. Plattsburg, etc., R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595;

powers conferred upon an agent must be exercised to advance the interests of the principal, and for no other purpose. He must not use either the assets or the credit of the principal, or any of the powers of his own office, except to advance the interests of the company irrespective of his own advantages or desires.<sup>1</sup> And it is the duty of the trustees to resist all invalid claims and protect its members and the funds in their hands.<sup>2</sup> So, the trustees of a benefit society cannot vote themselves back pay.<sup>3</sup>

**§ 132. Discretionary Powers cannot be Delegated.** — It is also the rule that discretionary powers, if conferred upon the agent, cannot be delegated.<sup>4</sup> But this rule also cannot be said to be invariable, as the power depends in each case upon the intention of the principal. A leading writer says upon this point: <sup>5</sup> “ It has sometimes been laid down as a rule, that powers involving the exercise of discretion and judgment cannot be delegated, except under an express grant of authority; but this statement of the rule is not strictly accurate. The authority of an agent to delegate powers to another agent depends always upon the intention of the principal. The appointment of an agent with powers requiring the exercise of judgment and discretion is, in many cases, an indication that the principal intended the judgment and discretion to be exercised by the particular agent whom he selected, but this is not always so. Thus, the directors of a corporation have, undoubtedly, implied authority to appoint various agents, the performance of

*Cumberland Coal Co. v. Sherman*, 30 Barb. 562; *Michoud v. Girod*, 4 How. 554.

<sup>1</sup> *York, etc., R. Co. v. Hudson*, 16 Beav. 485; *Gallery v. Nat. Exch. Bank*, 41 Mich. 169; *Koehler v. Black River Falls Iron Co.*, 2 Black. 715; *Wardell v. Union Pac. R. Co.*, 103 U. S. 651.

<sup>2</sup> *Mayer v. Equitable Reserve F. L. Assn.*, 42 Hun, 237.

<sup>3</sup> *State v. People's, etc., Assn.*, 42 Ohio St. 579.

<sup>4</sup> *Farmers' Fire Ins. Co., etc., v. Chase*, 56 N. H. 341.

<sup>5</sup> *Morawetz on Corp.*, § 535.



whose duties involves the exercise of a high degree of judgment and discretionary power. Directors of a railroad company may, without express authority, appoint engineers, superintendents, freight and passenger agents, and any other officers that may be required for the proper construction and management of the railroad. The directors of banking, insurance and commercial corporations have implied authority to employ financial agents. The employment of attorneys to manage the legal affairs of a corporation, and to institute or defend suits, is clearly within the implied authority of the directors or general managing agents. The board of directors have also implied authority to appoint a committee of their number with authority to execute the resolutions of the board, and to exercise general control over the affairs of the corporation during the recess of the board. The extent of the powers which may thus be conferred by the board of directors upon a committee, depends upon the character of the corporation, the frequency with which the board is required to meet, the nature of its duties and upon established custom. No more definite rule can be formulated.''

§ 133. **Officers and Agents of Benefit Societies.** — The affairs of benefit societies are partly managed by superior governing bodies, sometimes styled grand or supreme lodges, which have, in addition to officers corresponding to president, secretary and treasurer, certain committees whose duties are defined in the constitution or articles of association. These committees have many of the characteristics of boards of directors of corporations. In their particular lines of duty they may be general agents with almost unlimited powers, or special agents restricted by provisions of the society's laws. In all cases the rules of the organization would govern unless the officer or committee is held out to the world as having the authority that the designation and name would imply. Modified by usage or

habits of dealing, or restrictions of the articles of association and by-laws, their transactions would be governed by the same general principles applicable to the directors of corporations and, by analogy at least, the same rules would determine the powers and liability of such committees and officers.

§ 134. **Powers and Authority of Directors.** — Directors of a corporation cannot make important changes in its business or in any respect modify or change the constitution, their authority only extending to the supervision and management of the company's ordinary or regular business.<sup>1</sup> Nor can the directors depart from the general purposes of the corporation as defined in the charter.<sup>2</sup> In the leading case upon this subject<sup>3</sup> the vice-chancellor said: "The principle of jurisprudence which I am asked here to apply is, that the governing body of a corporation, that is in fact a trading partnership, cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not, of course, mean exclusively either directors or a general council; but the ultimate authority within the society itself, which would ordinarily be a majority at a general meeting. According to the principle in question, the special powers, given either to the directors or to a majority by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle, which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence."<sup>4</sup>

<sup>1</sup> *Railway Co. v. Allerton*, 18 Wall. 233.

<sup>2</sup> *Minor v. Mechanics' Bank*, 1 Pet. 71.

<sup>3</sup> *Pickering v. Stephenson*, L. R. 14 Eq. Cas. 322.

<sup>4</sup> *Ante*, § 131.

§ 135. **Formalities to be Observed by Agents.** — If the charter or by-laws prescribe any formalities for the orderly transaction of business these ordinarily must be observed. The rule has been thus laid down: <sup>1</sup> “The agents of a corporation must observe all formalities which are required by the company’s charter in the corporate transactions. Even the majority are not at liberty to disregard the forms prescribed by the charter, for they constitute a part of the fundamental agreement between the shareholders. And if any agent of a corporation acts in a manner which is not authorized by the company’s charter, his acts will not be binding. Thus, it has been held that where the charter of a company requires contracts of a particular description to be in writing, and signed by specified officers, or approved in a specified manner, no agent can bind the company by a contract of that description unless it was executed in the manner prescribed. And if the constitution of a company requires the concurrence of a certain number of directors in the making of a contract, or the doing of any other corporate act, a less number cannot bind the company.”

§ 136. **Distinction as to matters relating to Internal Management.** — A different rule sometimes prevails where certain formalities are prescribed for the internal management of the business of corporations. The same writer above quoted <sup>2</sup> says: “A party dealing with an agent of a corporation has usually no means of ascertaining whether formalities prescribed in the management of the internal affairs of the company have been complied with, and matters of this kind are peculiarly within the knowledge of the company’s agents. It has therefore been held, that, if a person deals with an agent of a corporation within the scope

<sup>1</sup> Morawetz on Corp., § 582.

<sup>2</sup> Morawetz on Corp., § 610.

of his apparent authority, and without notice of the non-performance of any formality prescribed by the charter or by-laws as a condition precedent to the agent's authority to act, he will be entitled to assume that the formality has been complied with, and the corporation will be estopped from showing that the agent had no authority to bind it, by reason of a failure to comply with the prescribed condition." It has also been said: <sup>1</sup> "A stranger must be taken to have read the general act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read any thing more, and, if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with."

§ 137. **Execution of Insurance Contracts.** — In an early case <sup>2</sup> it was held that, where the charter required that "all policies of assurance and other instruments" in order to be effectual and bind the company should be "made and signed by the president of said company or any other officer thereof, according to the ordinances, by-laws and regulations of said company, or of their board of directors," the contract to cancel a policy is as solemn an act as a contract to make one; and, to become the act of the company, must be executed according to the forms in which by law they were enabled to make the contract, and in another court <sup>3</sup> it was held that, where the charter of an insurance company required all policies to be signed by the president, it was not necessary that a consent to an assignment of the policy should be signed by him.<sup>4</sup>

<sup>1</sup> In re County Life Ass. Co., L. R. 5 Ch. App. 293.

<sup>2</sup> Head v. Providence Ins. Co., 2 Cranch, 166.

<sup>3</sup> New England Ins. Co. v. DeWolf, 8 Pick. 56.

<sup>4</sup> Post, § 429.

§ 138. **Acts and Meetings of Directors and Committee.**—“When, by charter, a board are constituted the agents of a corporation for particular purposes, and the number necessary to be present at the doing of an act is therein specified, an act done or a contract made by less than, or others than, those specified, will not bind the company. If the charter specify no particular number of the board of directors as requisite to bind the corporation, that power resides either in the number specified in a by-law or in a majority, as a quorum, a majority of which have power to decide any question upon which they can act, and it is very clear that a contract made by a minority of a committee appointed for the purpose of making it, not assented to by a majority, nor by the corporation, does not bind the latter. A majority of a committee authorized to sell lands by legislative resolve, or to do business of a public nature, have power to execute the commission; but in case of *quasi*-corporations, where a certain number, as three persons, are appointed or authorized to do a particular act, as to choose a chaplain, or to contract for the building of a meeting-house, in general they must concur in the act or contract to render it binding, though perhaps direct proof that all assented would not be required.”<sup>1</sup> A majority of the directors, in the absence of any regulation in the charter, is a quorum, and a majority of such quorum when convened, can do any act within the power of the directors.<sup>2</sup> It will be presumed that the meeting was legally called unless the contrary be shown.<sup>3</sup> Meetings can be held at any place,<sup>4</sup> and a member who is present at a meeting and makes no opposition to a resolution is presumed to assent to its adoption.<sup>5</sup> A

<sup>1</sup> Ang. & Ames on Corp., § 291.

<sup>2</sup> Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402.

<sup>3</sup> Lane v. Brainerd, 30 Conn. 577; Sargent v. Webster, 13 Metc. 497.

<sup>4</sup> Ohio & Miss. R. Co. v. McPherson, 35 Mo. 13; Arms v. Conant, 36 Vt. 744; State v. Smith, 48 Vt. 266; Bellows v. Todd, 39 Ia. 209.

<sup>5</sup> Mowrey v. Indianapolis, etc., R. Co., 4 Biss. 78.

formal meeting of the directors of a corporation is not necessary in order to enable them to do any act which is within their corporate powers,<sup>1</sup> unless notice of a meeting is required by the by-laws,<sup>2</sup> but, where the clauses of a statute enact that the directors of companies incorporated under the act are to hold meetings, at which the prescribed quorum must be present, and that questions at such meetings are to be determined by a majority of votes, it is essential that the directors act together, and as a board, though a fixed place of meeting is unnecessary.<sup>3</sup> Still it has been deemed sufficient presumptive proof, for a stranger, of the concurrence of a quorum of a board of directors of a corporation, to show that they assented separately.<sup>4</sup> It has been held<sup>5</sup> that where the charter and by-laws provided that meetings of the directors should be held on the call of the president and the latter refused to call any meetings, whereupon the trustees convened without such call, but after giving notice of the time and place of such meeting to the president, the acts done at such meeting were irregular and void.

**§ 139. Record of Proceedings of Meetings of Directors Need not be Kept.**—In the absence of directions to the contrary a board of directors, or agents, or a committee are not bound to keep a record or minutes of their proceedings.<sup>6</sup> The general rule has been thus laid down:<sup>7</sup> “If, indeed, the charter or creating and enabling act of a corporation, expressly make the recording of the acts of its board of directors essential to their validity, or a condition precedent thereto; or if it make a record taken by a pre-

<sup>1</sup> *Waite v. Windham Co. Mining Co.*, 37 Vt. 608.

<sup>2</sup> *Edgerly v. Emerson*, 23 N. H. 555.

<sup>3</sup> *D'Arcy v. Tamar, etc., R. Co.*, 2 L. R. Exch. 158; 36 L. J. Exch. 37;  
<sup>4</sup> *Hurl. & C.* 463.

<sup>4</sup> *Tenney v. East Warren, etc., Co.*, 43 N. H. 343.

<sup>5</sup> *State v. Ancker*, 2 Rich. (S. C.) 245.

<sup>6</sup> *Hutchins v. Byrnes*, 9 Gray, 367.

<sup>7</sup> *Ang. & Ames on Corp.*, § 291a.

scribed officer the only mode by which such acts can be legally proven; it is very obvious that to render the acts of the board obligatory, whether for or against the corporation, the charter requisite must be complied with in the one case, and that the charter mode of proof is the only one that can be resorted to in the other. The books, however, furnish us with no such provision in the charter of any corporation; and without it there seems to be nothing in principle or authority to distinguish in this particular the acts of a board of agents, existing within a corporation from the acts of agents constituted by natural persons. It is usual, indeed, by way of notice, and to facilitate proof, for the charter and by-laws to provide that a fair and regular record of the proceedings of the managing board of a corporation should be made by some designated officer, as the cashier of a bank, or the clerk or secretary of an insurance company. Such provisions are, in common, merely directory to the corporation, its officers or agents; and the breach or neglect of them, though it may render the directors or their scribe responsible in case of consequential damage for violation of duty, is a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws, and by no means affects the validity of the unrecorded acts." "It is not necessary," said Chancellor Zabriskie,<sup>1</sup> "that the minutes of a corporation should be written up by the secretary in his own handwriting, or that they should be approved by the board. And, in fact, if it was shown that the resolution had been passed by the board when lawfully assembled, it would be valid, although never entered upon the minutes."

**§ 140. Powers of President.** — The president of a corporation is its chief executive officer, charged with the duty

<sup>1</sup> Wells v. Rahway White Rubber Co., 19 N. J. E. 402.

of a general superintendence of the company's affairs and of seeing that the directions of the board of directors are carried out. In some respects he is like an ordinary director and so in many companies their affairs are managed by an officer styled "managing director" instead of president. The powers of the president, or other chief officer, extend only to matters arising in the ordinary course of business,<sup>1</sup> and he may perform acts of an ordinary nature, which by usage or necessity are incident to his office, without special authority.<sup>2</sup> These powers may be inferred from facts and circumstances,<sup>3</sup> and from his habits of acting as business agent with the knowledge and without the objection of the company.<sup>4</sup> If his acts be shown to be within the scope of his authority they are binding upon the company.<sup>5</sup> The president of a corporation can employ counsel;<sup>6</sup> but cannot confess judgment;<sup>7</sup> nor sell the land of the corporation;<sup>8</sup> nor dispose of the company's property generally;<sup>9</sup> nor act usually for the company in matters not in the ordinary administration of business.<sup>10</sup> The president of a mutual insurance company cannot waive the conditions of an insurance policy prescribed by the by-laws of the company which are of the essence of the contract, nor make a contract different from that prescribed by such laws.<sup>11</sup> There

<sup>1</sup> *Blen v. Bear River, etc.*, 20 Cal. 602; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. 450.

<sup>2</sup> *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. 297.

<sup>3</sup> *Northern Central R. Co. v. Bastian*, 15 Md. 494.

<sup>4</sup> *Martin v. Webb*, 110 U. S. 7; *Dougherty v. Hunter*, 54 Pa. St. 380; *Olcott v. Tioga R. R. Co.*, 40 Barb. 179.

<sup>5</sup> *Farmers' Bank v. McKee*, 2 Pa. St. 318; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116.

<sup>6</sup> *Colman v. West Va. Oil Co.*, 25 W. Va. 148; *Savings Bank v. Benton*, 2 Metc. (Ky.) 240; *Oakley v. Workingmen's Ben. Soc.*, 2 Hilt. 487.

<sup>7</sup> *Stokes v. N. J. Pottery Co.*, 46 N. J. L. 237.

<sup>8</sup> *Bliss v. Kaweah C. & I. Co.*, 65 Cal. 502.

<sup>9</sup> *Walworth Co. Bank v. Farmers', etc., Co.*, 14 Wis. 325.

<sup>10</sup> *Bright v. Metaire Cem. Assn.*, 33 La. Ann. 58.

<sup>11</sup> *Priest v. Citizens' Ins. Co.*, 3 Allen, 602; *McEvers v. Lawrence*,



is no objection to the president acting as secretary of a meeting of the board of directors if so desired.<sup>1</sup>

§ 141. **Of Vice-President.** — In regard to the duties of vice-president it has been said :<sup>2</sup> “ As a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead and perform the duties which devolve upon the president. And such being the case, it must be held that, as Rose refused to act as president of the company, Brough, the vice-president, could not only act as president, but it became his duty to so act in the transaction of the business of the company. Nor does it matter that the act under which the body was organized does not enumerate a vice-president as one of the officers of the company; but after providing that there shall be a president and other officers named, it authorizes the company to create other officers. And this company, by their by-laws, declared there should be a vice-president, and imposed the duty on him of assisting the president in the performance of such duties as he might require. In organizing such a body, such an office is, if not essential, usually created; and this organization, having provided for and elected such an officer, we must hold that he may perform the duties imposed upon the president in the same cases and under the same circumstances that such an officer may act when the office is created by the charter of the company. We see no objection to the deed because it was signed by Brough, as there was no president of the company.” The second vice-president, who presided at a meeting of a society, it was held,<sup>3</sup> could after the adjournment of the meeting, appoint a committee of inves-

Hoff. Ch. 172; *Brewer v. Chelsea F. Ins. Co.*, 14 Gray, 203. But see *post*, § 429.

<sup>1</sup> *Budd v. Walla Walla, etc., Co.*, 2 Wash. T. 347.

<sup>2</sup> *Smith v. Smith et al.*, 62 Ill. 496.

<sup>3</sup> *Burton v. St. George's Society*, 28 Mich. 261.

tigation, called for by a resolution adopted at such meeting, and the first vice-president could fill the vacancies in the committee caused by the declination of certain of the appointees. As in the case of other officers, the charter must be looked to for the enumeration of the powers of the vice-president and if the constitution is silent, then the by-laws or the custom of the society or of similar societies.

§ 142. **Of Secretary.** — The secretary of a corporation is its officer to keep its records, books and seal and to act generally under the directions of the directors and president. His powers and duties are usually prescribed by the by-laws, but if they are not he has the powers ordinarily exercised by the corresponding officer of companies in the same line of business, or those which the customs and habits of his company have conferred upon him. There is no reason why the secretary of an insurance company or benefit society should have any other or different powers than those of the corresponding officer of other organizations, or his authority be determined by any different rules. The secretary of the corporation is the proper person to have possession of, and prove, the books of the company;<sup>1</sup> and the directors are presumed to have control over him;<sup>2</sup> he can make minutes of a meeting of the directors after the meeting has been held and they will relate back to the time of the transaction.<sup>3</sup> He may impose fines on members for non-payment of contributions, if it be so provided by the by-laws,<sup>4</sup> but he cannot affix the corporate seal to a company obligation upon the consent of directors given as they are met separately on the street, if the law of the body or statutes require a formal meeting.<sup>5</sup> The secretary of a cor-

<sup>1</sup> *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479.

<sup>2</sup> *Elmes v. Ogle*, 2 Eng. L. & Eq. 379; 15 Jur. 180.

<sup>3</sup> *Commercial Bank, etc., v. Bonner*, 13 Smed. & M. 649.

<sup>4</sup> *Parker v. Butcher*, L. R. 3 Eq. Cas. 762.

<sup>5</sup> *D'Arcy v. Tamar, etc., R. Co.*, L. R. 2 Exch. 158.

poration remains, like other officers, in office until a successor is chosen.<sup>1</sup> The statement of the secretary of a mutual benefit association to the insured that he need not pay his dues until certain charges then pending against him which, if true, made the policy forfeitable, were disposed of, is not out of the scope of his duties, but binds the company.<sup>2</sup> A deed, though not attested by him, will be valid if the charter does not require such attestation, although it may be (unknown to the grantees) required by the by-laws.<sup>3</sup> Unless there is some provision in the charter of a society for a single secretary, the society may direct any of its officers or agents to perform any of the appropriate duties of the secretary, and in such case such agent so designated is made secretary for that purpose.<sup>4</sup>

§ 143. **Of Treasurer.** — The treasurer of a corporation is its officer charged by law with the custody of its funds and responsible for their safe keeping. So, where the by-laws provided that the treasurer should have custody of the moneys of a corporation and give bond for their safe keeping, it was held<sup>5</sup> that the directors could not lawfully deprive the corporation of the benefit of this responsibility by depositing the funds with others, or causing such disposition to be made, and that they might be restrained by injunction from so doing at the suit of any stockholder, a proper case being made. It has been said<sup>6</sup> that a corporation by conferring upon a person the appointment of treasurer, holds him out to the world as its proper agent to receive funds paid to it; and such officer is the only proper person to whom, when payment is made, notice of the pur-

<sup>1</sup> *South Bay, etc., v. Gray*, 30 Me. 547.

<sup>2</sup> *Jones v. National Mut. Ben. Assn. (Ky.)* 2 S. W. Rep. 447.

<sup>3</sup> *Smith v. Smith*, 62 Ill. 496.

<sup>4</sup> *Peck v. New London, etc., Ins. Co.*, 22 Conn. 575.

<sup>5</sup> *Pearson v. Tower*, 55 N. H. 215.

<sup>6</sup> *N. E. Car Spring Co. v. Union Indian Rubber Co.*, 4 Blatchf. 1.

pose to which the payment is to be applied should be given. The treasurer of a corporation must keep its moneys distinct from his own, unless it is otherwise agreed, and pay any balance due on demand,<sup>1</sup> and he only has power to bind the company by acts in the usual course of business, for unusual acts some special authority must be shown;<sup>2</sup> he cannot sell or assign, without such special authority, the securities of his company.<sup>3</sup> In a case<sup>4</sup> where the treasurer purchased a claim against the company, it was held that he could not maintain a suit upon it against the corporation, because such purchase extinguished the debt. But upon principle he could recover what money he advanced to buy the claim, because he was acting as a trustee for its benefit and it should repay his advances. The treasurer of a voluntary association will be directed to account for moneys in his hands and pay over according to the interest of the association.<sup>5</sup> When by a resolution of an association, the treasurer was directed under certain contingencies to return to each member the amount contributed by him to the common fund, it was held that he was liable to an action brought against him by a member to recover his share, the agreed contingency having occurred.<sup>6</sup> So, if an unincorporated body, through its treasurer, has received on deposit, certain money, a suit by the owner will lie against the treasurer in his individual capacity to recover such money;<sup>7</sup> but it has also been held,<sup>8</sup> that no action can be maintained by the treasurer of an unincorporated association against one

<sup>1</sup> *Second Ave. R. R. Co. v. Coleman*, 24 Barb. 300.

<sup>2</sup> *Stark Bank v. U. S. Pottery Co.*, 34 Vt. 144; *Dedham Inst., etc., v. Slack*, 6 Cush. 408.

<sup>3</sup> *Jackson v. Campbell*, 5 Wend. 572.

<sup>4</sup> *Hill v. Frazier*, 22 Pa. St. 320.

<sup>5</sup> *Penfield v. Skinner*, 11 Vt. 297; *Piggott v. Thompson*, 3 Bos. & Pul. 146.

<sup>6</sup> *Koehler v. Brown*, 2 Daly, 78.

<sup>7</sup> *Bennett v. Wheeler*, 12 La. Ann. 763.

<sup>8</sup> *Ewing v. Medlock*, 5 Port. (Ala.) 82.

upon his promise in writing to pay money — the same being payable to the “treasurer” of such association alone. In that case the court said: “To maintain that the plaintiff has a right to the action would be to put him upon the same ground he would occupy, if the association had been incorporated, and made capable by its charter, of suing in the name of whoever might be the treasurer of the club, upon instruments made payable to the treasurer. Such a capacity to maintain an action can be conferred by a charter only. If the money had been payable to the plaintiff by his individual name, the right to the action would belong to him, and the description of him as treasurer of the club would not affect the right. The only effect the description would have, would be to make him a trustee for the members of the association. If the treasurer of the club could maintain the action, the right to the action might belong to different individuals at different times. The club may remove from office a person who was the treasurer when such a promise was made, and appoint a successor. In such a case the right which once belonged to one person as treasurer, would be exercised by another, without an assignment from him who was first entitled; for an assignment would be without effect, as the promise is made to no one individually.”

§ 144. **Dual Capacity of Subordinate Lodges of an Order.** — We have seen<sup>1</sup> that benefit societies generally have a complex organization; first are the local and subordinate lodges under the control of a grand lodge, next is this grand lodge made up of representatives from the local lodges, and lastly may be a supreme lodge composed of delegates from the grand lodges. The certificate or policy of insurance is issued by the supreme or grand lodge to the member through the local lodges, making the latter an

<sup>1</sup> *Ante*, § 11 *et seq.*

agent for this purpose ; and then there may be a collateral benefit to be paid by the local lodge in case of sickness, in the contract for payment of which the local lodge is a principal. The contract in the former case is the constitution and by-laws of the grand or supreme lodge, in the latter the constitution and by-laws of the local lodge, which usually, however, refer to the constitutions and by-laws of the grand and supreme lodges and make them also a part of the agreement. To these contracts the member assents when he becomes such and consequently is presumed to know their terms.<sup>1</sup> The subordinate lodges, therefore, and sometimes the grand lodges, are principals in certain transactions and agents in others, and so are governed by different rules as they act in one capacity or the other.

§ 145. **Officers and Committees of Benefit Societies are Special Agents.**—The affairs of the constituent parts of a benefit society, as local, grand and supreme lodges, are managed by officers, corresponding to president, secretary, treasurer, etc., the same as in other associations or corporations, and by standing, or regular, committees. The latter are generally provided for in the constitution, articles of association and by-laws, and have charge of certain matters, as finance, appeals from subordinate lodges or other special branches of the business. They are like directors in many respects, and the members of each committee act together as one body upon the questions coming before them. They are special agents, whose powers and duties are prescribed by the fundamental law of the organization, but on principle can perform all things within the usual and ordinary scope of their employment. The general rules of agency apply to them and also the principles which

<sup>1</sup> *Hellenberg v. District No. 1*, 94 N. Y. 580; *St. Patrick's Soc. v. McVey*, 92 Pa. St. 510; *Dolan v. Court Good Samaritan*, 128 Mass. 439; *Coleman v. Supreme Lodge, etc.*, 18 Mo. App. 189; *Leech v. Harris*, 2 Brewst. 571.

determine the authority of boards of directors. There may also be special committees, created at any time for special purposes, or to do certain things, in which case they will be authorized to employ such means as are necessary and usual to accomplish the objects of their appointment. The authority of many of these committees is so extensive as to really constitute them general agents in particular directions and bind their principals by whatever they do relating to such matters.

§ 146. **Benefit Societies in Law are Mutual Life Insurance Companies.** — The disposition of the courts has been to hold that benefit societies paying a specified sum to the beneficiaries of a deceased member are to be treated as mutual life assurance organizations. The Supreme Court of Wisconsin in a case involving the liability of a benevolent mutual aid society for a death loss,<sup>1</sup> said: “ We suppose the company is subject to the application of those legal principles applicable to other mutual life insurance companies.” In this case the defendant was the incorporated superior, governing a number of subordinate lodges of a social and benevolent organization, known as the “ Order of Hermann’s Sons.” The Supreme Court of Maine, in a case where the benefit promised by a Masonic relief association was in question, said: <sup>2</sup> “ If the prevalent purpose and nature of an association, of whatever name, be that of insurance, the benevolent or charitable results to its beneficiaries would not change its legal character. And that this association, *et id omne genus* are mutual life insurance companies, we entertain no doubt whatever.”<sup>3</sup>

§ 147. **Difference between Powers of Agents of Stock and those of Mutual Insurance Companies.** — A distinc-

<sup>1</sup> *Erdmann v. Mutual Ins. Co., etc.*, 44 Wis. 376.

<sup>2</sup> *Bolton v. Bolton*, 73 Me. 299.

<sup>3</sup> *Ante*, § 52.

tion has been sought to be made between agents of stock and those of mutual companies, and generally it may be said that the representatives of the former have greater powers in settling the terms of the contract and in waiving compliance with its conditions than have the agents of mutual companies where the by-laws enter into the contract and prescribe that the stipulations shall be the same in all policies and shall regulate alike the rights of all. In Massachusetts, New Jersey and Rhode Island, the courts have ruled strictly on the power of the officers and agents of mutual companies to depart from the directions and regulations of their charters and by-laws, interpreted in the light of the purposes for which these companies were established, but these views have not met with favor in other States, where a more liberal construction has been adopted and the differences between stock and mutual companies have been looked upon as more nominal than real. In the first mentioned States the safety of the companies has been the chief consideration, in the latter the protection and safety of the public. The Massachusetts doctrine may be illustrated by a few extracts. In one case<sup>1</sup> the by-laws of the company provided that insurance subsequently obtained without the written consent of the president should avoid the policy and that the by-laws should in no case be altered except by a vote of two-thirds of the members of the company. In this case subsequent insurance was obtained with the *oral* consent of the president and the court held that the policy was avoided. It said: "It is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws, by reason of the subsequent insurance obtained by Stone and Perry on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president,

<sup>1</sup> *Hale v. Mechanics' Mutual F. Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410.



and his verbal consent to such subsequent insurance, as found by the jury, operate to set aside this provision in the by-laws as to this particular policy and render the contract valid, notwithstanding by its express terms, as well as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver, or give such verbal assent. He was an agent, with powers strictly limited and defined, and could not act so as to bind the defendants beyond the scope of his authority.<sup>1</sup> By article fifteen of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over insurance, the corporation might well require that any assent on their part to further insurance on property insured by them should be given by the deliberate and well considered act of their president in writing and not left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case and, as the evidence shows, were fully known to the assured."<sup>2</sup> In a subsequent case<sup>3</sup> the same court held that in matters that did not relate to the substance of the contract, but only to the remedy, the requirements of the by-laws could be waived by the officers of the company. This doctrine, that officers of a mutual company cannot waive the by-laws of the company, has been approved in other cases on the ground that if the officers have discretionary powers as to

<sup>1</sup> Story on Ag., §§ 127, 133; *Salem Bank v. Gloucester Bank*, 17 Mass. 29; 9 Am. Dec. 111.

<sup>2</sup> *Worcester Bank v. Hartford Fire Ins. Co.*, 11 Cush. 265; 59 Am. Dec. 145; *Lee v. Howard Fire Ins. Co.*, 3 Gray, 584.

<sup>3</sup> *Brewer v. Chelsea, etc., Ins. Co.*, 14 Gray, 209.

the terms of the contract the principle of mutuality would be completely abrogated.<sup>1</sup> Other courts have inclined to the view that there is no difference between agents of mutual and those of stock companies, especially in soliciting applications. As was said in one case:<sup>2</sup> “Incorporated companies, whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually, and as a part of their system of business, transcend their powers. How else are third persons to deal with them with any degree of safety?”<sup>3</sup>

**§ 148. Authority of Subordinate Lodges when Acting for Grand or Supreme Lodges.** — That subordinate lodges are in many transactions agents of the superior, grand or supreme lodges is too clear for argument; the courts have often acted on this assumption.<sup>4</sup> In the case first cited the controversy was over a death benefit promised by the society and it was claimed by the plaintiff that the local lodge had waived the requirement of prompt payment of an assessment. The court said:<sup>5</sup> “The constitution and by-laws certainly contain the contract which was entered into by the parties. The grove surely acts for and represents the defendant in making the contract with the member unless we adopt as correct the idea or conclusion resulting

<sup>1</sup> *Evans v. Trimountain M. F. Ins. Co.*, 9 Allen, 329; *Behler v. German, etc., Ins. Co.*, 68 Ind. 354; *Westchester, etc., Ins. Co. v. Earle*, 33 Mich. 150; *Baxter v. Chelsea M. F. Ins. Co.*, 1 Allen, 294; *Belleville M. Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 333; *Wilson v. Conway M. F. Ins. Co.*, 4 R. I. 141.

<sup>2</sup> *Conover v. Mutual Ins. Co.*, 1 Comst. 290.

<sup>3</sup> *Post*, § 153.

<sup>4</sup> *Schunck v. Gegenzeiter*, 44 Wis. 369; *Erdmann v. Mutual Ins. Co.*, etc., 44 Wis. 376; *Scheu v. Grand Lodge, etc.*, 17 Fed. Rep. 214; *Barbaro v. Occidental Grove, etc.*, 4 Mo. App. 429.

<sup>5</sup> *Schunck v. Gegenzeiter, etc.*, *supra*.

from the counsel's position, namely, that the member by some one-sided arrangement makes a contract with himself through his own agent. It seems to us that any such position as that the grove is the sole agent of the member in effecting the insurance or collecting the assessments is untenable."<sup>1</sup> In a case in Missouri<sup>2</sup> the subject of the authority of local lodges, subordinate to a supreme lodge, in matters relating to the benefit promised by the latter was considered considerably at length. In this case Judge Thompson delivered the opinion of the court, in the course of which he said: "The subordinate lodges are no doubt the agents of the supreme lodge in dealings with the members for many purposes and in those cases where the subordinate lodges act through their ministerial officers, and where the latter act in conformity with the rules governing the lodges and the order, these officers may become *pro hac vice* the agents of the subordinate lodges. But it is not shown to us that these officers are anywhere endowed with power to set aside the rules of the order, or that the subordinate lodges are endowed with such a faculty. On the other hand, it is perceived by the provision of the laws of the order above quoted, that no grand lodge has power even to alter or amend the laws governing the subordinate lodges. The doctrine of waiver, which is often appealed to to prevent forfeitures in the case of policies of insurance, has no application to the forfeitures of memberships in these orders. The laws and rules governing the different branches of such an order, are in the nature of contracts among all the members, and considering the widespread extent of these organizations and the very great extent to which these schemes of benevolence have taken the place of life insurance, especially among the working classes, it is highly important.

<sup>1</sup> Supreme Lodge v. Abbott, 82 Ind. 1; Hall v. Supreme Lodge, 24 Fed. 450.

<sup>2</sup> Borgraefe v. Knights of Honor, 22 Mo. App. 127.

as a principle of public policy, that in cases of this kind, their rules and regulations should be substantially upheld by the judicial courts.”<sup>1</sup>

**§ 149. Have Subordinate Lodges the Characteristics of Ordinary Insurance Agents.** — We have seen from the last sections that benefit societies are like life insurance companies in that they are engaged in the same kind of business. We have also seen that the subordinate lodges are the agents through which the grand or supreme lodges transact this business. The suggestion at once arises that, if this be true, the local lodges, when acting for these superior organizations in bringing in new members, taking their applications and consummating the contract, are doing just what the ordinary life insurance agent does. There are many points of dissimilarity between them in the methods of conducting the business and the contract is made in an entirely different way, but nevertheless the principles underlying the contract in both cases are very much the same.

**§ 150. To what Extent can Local or Subordinate Lodges Bind the Superior Body.** — Usually the agents of life insurance companies do not have authority to conclude absolutely a contract of insurance, but only to procure and receive applications, which they forward to the company to be acted upon by the immediate officers of the corporation, who alone have the power to issue the policy.<sup>2</sup> If, as in the case of fire insurance companies, the agents were entrusted with blank policies their powers would be very much greater and different rules would apply in determining the liability of their principals for their acts. The sub-

<sup>1</sup> Karcher v. Supreme Lodge, 137 Mass. 368; Hall v. Supreme Lodge, 24 Fed. Rep. 450; Chamberlain v. Lincoln, 129 Mass. 70; Rood v. Railway, etc., Assn., 31 Fed. Rep. 62.

<sup>2</sup> Bliss on Life Ins., § 283.

ordinate lodges of a great beneficiary order may have either a very limited or a very wide authority: if they have blank certificates which they can issue to whom they please they can bind their superior by almost anything they do in the line of issuing them. Generally, however, the local lodges are like the agents of life insurance companies in that they can only solicit applications which are referred to the superior body to be accepted or declined as its officers may elect. The subordinate lodges are tied down by instructions which they cannot violate even if they were so inclined. The law of benefit societies still is in its infancy and many important questions are still to be determined in regard to the authority of the local lodges when acting as agents of the responsible corporation. For example, the courts must soon decide to what extent the knowledge of the local lodge is that of the superior; whether notice to the former binds the latter; and how far the principal is liable for the misfeasance or neglect of the agent. Of course, the rule applies to these societies as to mutual insurance companies that the members are supposed to have knowledge of all limitations upon the power of the lodge officers, or the lodge itself, contained in the charter and by-laws; but, as we shall see, the tendency of the courts is to ignore whenever possible the differences between purely mutual and the ordinary stock companies. The probabilities are that future decisions will trace stronger resemblances between benefit societies and life insurance companies and, as their methods of business become more alike, so it will be easier to apply the same rules to the contracts of both. The society and regular company alike issue certificates or policies which are sent to the local agent, or lodge, who countersigns and delivers them, and afterwards collects and remits the assessments or premiums. Though the society has a fraternal and charitable feature that the company has not, the principal business of both is the sale of life insurance for a con-

sideration. The reasonable inference is that the same principles of agency determine in each case the liability of the principal for the acts of the agent.

§ 151. **General Rules of Agency apply to Agents of all Kinds of Companies.** — It must not be thought that the established rules of the law of agency do not apply to the transactions of life insurance companies. There is no particular sanctity about the business of life, or any other kind of, insurance. The companies engaged in it have the right to employ agents and give to them such authority as they please; whatever limitations are imposed upon such agents, if communicated to those dealing with them, will be binding and if this authority is exceeded, the act will not hold the principal. On the other hand, if the agents are held out to the public as possessing certain powers, their acts within the apparent scope of this authority will bind their principals. While the business of life insurance has its recognized peculiarities, the courts have constantly endeavored to apply to all the transactions of the agents of fire or life insurance organizations, or mutual benefit societies engaged in doing a life insurance business, the general doctrines of the law of agency. The inquiry always is: What was the contract entered into by the parties? If made through an agent what was the authority of the agent, and had the party dealing with him any notice of limitations or restrictions upon such authority, or were there sufficient circumstances to put him on his guard and to require him to acquaint himself with this actual authority? Of course, in these, as in other cases, much depends upon the special circumstances of each case, but the same rules must be applied to all. It is reasonable, on principle, to distinguish between the acts of agents of mutual organizations, where the assured is supposed to acquaint himself with the laws of the society and the limitations, if any there be contained in them, upon the powers of such agents, and cases

where the agent represents a corporation dealing with all as a stranger. As we inquire further into the subject we shall find that the cases are not always consistent, though these inconsistencies become fewer as we study them. It is not that the courts are in doubt as to what is the principle of the law of agency, which is to be applied, but because other legal principles are invoked to modify the hardships of a vigorous application of the strict rules of agency, that the difficulties in reconciling the cases exist.

§152. **Authority of Life Insurance Agents.** — We shall gain a clearer idea of the difficulties that have arisen in construing the authority of the agents of insurance companies if we consider the methods of transacting the business in common use. The companies seek customers throughout a wide extent of territory: they have their agents in every town of every State who devote their time to securing business. These agents, particularly those of life insurance companies, for the representatives of fire companies are generally now intrusted with blank policies which they can countersign and issue, are not authorized to conclude contracts or to issue policies, but only to take the proposal of the applicant which is submitted to the principal and by it accepted or rejected. The companies for their protection in dealing with so many strangers make the form of these proposals, or applications, comprehensive and in them are a large number of questions to be answered by the person to be insured. By the terms of the application, the truth of the answers to these questions is warranted and the proposal is made a part of the policy, which is to be void if any of the answers to these questions are found to be untrue. It was found that frequently, though the applicant had answered the questions truthfully, the agent of the company, who had prepared the application and written down the answers, had, through accident or design, incorrectly reported them, so when the applicant signed the paper, supposing it

contained what he had stated, he warranted something to be true which was false and when a loss occurred he discovered that he had stipulated away his right of recovery. Naturally he sought to lay the blame on the agent, for whose mistakes and faults, while acting in the apparent scope of his authority, he claimed the principal was responsible. On the other side the company claimed the protection of the express contract and invoked the aid of the rule that parol testimony was not admissible to explain or modify the terms of this written contract. The insured asked to have the doctrine of equitable estoppel applied and insisted that, if the answers were correct but were not exactly written down by the agent of the company the latter was precluded from insisting upon the defense. Here was the first difficulty which presented itself and often the companies lost through the inclination of the courts to apply the principles of the law of estoppel. Then came up a new complication. To avoid the effect of these decisions, and for the purpose of taking away the right to invoke them, a clause was inserted in the contract whereby the insured agreed that any person, other than such insured, acting in preparing the application or effecting the insurance (the agent of the company being thereby meant), should for all intents and purposes be taken and deemed to be the agent of the insured and not of the company. From this stipulation arose the much debated question of dual agency in insurance contracts,<sup>1</sup> which question has caused much of the apparent conflict in the cases. In dealing with this subject the rule has been applied that insurance contracts are to be liberally construed in favor of the insured and most strongly against the insurer. The disposition of the courts has also been to ignore the suggestion that an agent can represent both parties

<sup>1</sup> This subject is exhaustively discussed in 6 South. L. Rev. 367, by J. O. Pierce, and in 10 Am. L. Reg. 680 (note to *Von Borries v. United, etc., Ins. Co.*, 8 Bush, 133), by W. W. Wiltbank.



to a contract, but to require of insurance agents an undivided allegiance to a single principal and a faithful observance of all duties towards him, and in the determination of controversies as to the powers of agents the companies have been held responsible for all the acts of their agents within the apparent scope of their employment in carrying out the business intrusted to them.

§ 153. **The Modern Doctrine.** — The most approved rule may be thus stated: Agents of life insurance companies are like those of other corporations; in doing the business of their employers they can represent them alone, and not first one party to the contract and then the other. The principals are bound by all acts within the apparent scope of the authority of the agents while engaged in transacting the business, but all limitations upon the agent's powers, which are brought to the knowledge of the persons dealing with them, must be respected.<sup>1</sup> The difficulty is in the application of this rule for, while the principles of the law are inflexible and always the same, the facts of no two cases are alike. It is hard to apply the proper principle to these varying facts. We may illustrate this modern doctrine by some free quotations from leading cases. The first of these<sup>2</sup> while it relates primarily to a fire insurance contract, is applicable generally, for its summary of the law is undoubtedly correct. "On principle, as well as for considerations of public policy, agents of insurance companies, authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the application, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered

<sup>1</sup> *Post*, § 158.

<sup>2</sup> *Kausal v. Minnesota Farmers', etc., Assn.*, 31 Minn. 17; 47 Am. Rep. 776.

necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up the applications, — a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the assured.<sup>1</sup> After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent

<sup>1</sup> *Insurance Co. v. Mahone*, 21 Wall. 152; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Malleable Iron Works v. Phoenix Insurance Co.*, 25 Conn. 465; *Hough v. City Fire Insurance Co.*, 29 Conn. 10; 76 Am. Dec. 581; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479; *Winans v. Allemania Fire Ins. Co.*, 38 Wis. 342; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393. See also *Mullin v. Vermont Mutual F. Insurance Co.*, 58 Vt. 113; *Continental Ins. Co. v. Pierce* (Kan.), 18 Pac. Rep. 291; *Eggleston v. Council Bluffs Ins. Co.*, 65 Ia. 308; *Menk v. Home Ins. Co.* (Cal.), 14 Pac. Rep. 837; 18 *Id.* 117; *McGraw v. Germania Fire Ins. Co.*, 54 Mich. 145; *Langdon v. Union M. L. Ins. Co.*, 14 Fed. Rep. 272; *Lueders v. Hartford L. & A. Ins. Co.*, 12 Fed. Rep. 465.

of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, 'there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.' If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence, we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through his agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle and in accordance with

public policy.<sup>1</sup> It is contended by respondent that there is a distinction in this regard between 'stock' and 'mutual' insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and in the authority of the agents employed; that in the case of a mutual company, the application is in effect not merely for insurance, but for admission to membership—the applicant himself becoming a member of the company upon the issue of the policy. By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter, or by-laws of the company, and that a person applying for membership is conclusively bound by the terms of such charter and by-laws. Such is not this case, for the stipulations claimed to bind the insured are only in the policy. But so far as concerns the question now under consideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issue of the policy. But in applying and contracting for insurance, the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other.

<sup>1</sup> *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331. See also *Planters Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521; *Piedmont & A. L. Ins. Co. v. Young*, 58 Ala. 476; *Delancey v. Ins. Co.*, 52 N. H. 581; *Commercial Union Ass. Co. v. Elliott (Pa.)*, 13 Atl. Rep. 970; 12 Cent. Rep. 668; *Baker v. Ohio Farmers Ins. Co. (Mich.)*, 38 N. W. Rep. 216; 14 West. Rep. 438; *McArthur v. Ins. Co. (Ia.)*, 35 N. W. Rep. 430 and note; *Sullivan v. Phenix Ins. Co.*, 34 Kan. 170; *Eilenberger v. Protective, etc., Ins. Co.*, 89 Pa. St. 464.

The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company.”<sup>1</sup> The Supreme Court of the United States also has said:<sup>2</sup> “The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agents, within the scope of his employment, as if they proceeded from the principal. In the fifth edition of *American Leading Cases*,<sup>3</sup> after a full consideration of the authorities, it is said: ‘By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain, or taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.’ The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name

<sup>1</sup> *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331. See also *Eilenberger v. Protective, etc., Ins. Co.*, 89 Pa. St. 464; *Whited v. Germania Ins. Co.*, 76 N. Y. 415; *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. St. 223; *Thompson v. Ins. Co.*, 104 U. S. 252, and *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

<sup>2</sup> *Ins. Co. v. Wilkinson*, 13 Wall, 235.

<sup>3</sup> Vol. 2, p. 917.

is signed to it, that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.”<sup>1</sup>

§ 154. **The Contrary View.**—The views expressed in the foregoing cases have not always been received with approval, but have been criticised with great force and reason. The Supreme Court of New Jersey furnishes perhaps the leading authority<sup>2</sup> on the other side, and argues that the doctrine of *Insurance Company v. Wilkinson*,<sup>3</sup> strikes at the foundation of the recognized principle that parol evidence is not admissible to explain or modify the terms of a written contract. “To except policies of insurance out of the class of contracts to which they belong,” says the court, “and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds.”<sup>4</sup>

§ 155. **The General Rule Unimpaired.**—The general rule must be taken to be unimpaired by these modern decisions, which apply the principle that where a written contract is entered into all previous preliminary agreements and

<sup>1</sup> *Insurance Co. v. Mahone*, 21 Wall. 152; *post*, § 221 and § 428.

<sup>2</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; 8 Ins. L. J. 134.

<sup>3</sup> 13 Wall. 222, *supra*.

<sup>4</sup> *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 438; *Jennings v. Chenango Co. Mut. Ins. Co.*, 2 Denio, 75; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; 58 Am. Dec. 420; *Barrett v. Union Mut. Ins. Co.*, 7 Cush. 175; *Deweese v. Manhattan Ins. Co.*, 6 Vroom (35 N. J. L.), 366; *Lewis v. Phoenix M. L. Ins. Co.*, 39 Conn. 100; *Ryan v. World M. L. Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490; *post*, § 221 and § 428.

negotiations are merged in it, and an insurance policy, together with the application, if incorporated therein or properly referred to, govern all matters covered by it.<sup>1</sup> If the contract, whether contained in the policy and application, or the constitution and by-laws of a mutual organization, provides that the insurers are not to be bound by any agreements or statements of the agent, unless the same be incorporated or referred to in the contract, then such provision of the parties will be enforced.<sup>2</sup>

§ 156. *Dealings with Agents of Mutual Companies.* — A distinction has sometimes been made between policies issued by a stock company and those issued by a mutual company, but this distinction is without any substance. The insured, in a mutual company, by taking out a policy, becomes a member of it. But nevertheless a member of a corporation, and even a director, in dealing with the corporation stand, in respect to their contracts just the same as a stranger,<sup>3</sup> and the Supreme Court of Pennsylvania says: “Too much is attempted to be made of the relation of coporporator in which the insured stands, in mutual insurance companies. In the act of insurance he is not so, but a stranger; and he becomes a corporator only by the consummation of that fact; and this does not convert the previous act of examination and description, by the agent of the company, into his act and change it into a representation by him.”<sup>4</sup>

<sup>1</sup> *Ins. Co. v. Mowry*, 96 U. S. 544; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Thompson v. Ins. Co.*, 104 U. S. 252; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519; *Am. Ins. Co. v. Neiberger*, 74 Mo. 167.

<sup>2</sup> *Enos v. Sun Ins. Co.*, 67 Cal. 621; *Leonard v. Am. Ins. Co.*, 97 Ind. 299; *Lycoming Ins. Co. v. Langley*, 62 Md. 196; *Loehner v. Home M. Ins. Co.*, 17 Mo. 247.

<sup>3</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 579; *Stratton v. Allen*, 16 N. J. Eq. 229.

<sup>4</sup> *Cumberland Valley Ins. Co. v. Schell*, 29 Pa. St. 31.

<sup>5</sup> *Kausal v. Minnesota Farmers', etc., Ins. Co.*, 31 Minn. 17; 47 Am. Rep. 776, *ante*, § 148.

§ 157. **Membership in Mutual Benefit Societies.**—It would seem reasonable that the doctrine ought to generally prevail that every person wishing to become a member of a mutual benefit society should be supposed to make himself acquainted with the charter and regulations of the society, and, where these are specific in their requirements or limitations upon the powers of agents, or lodges, then that all such requirements and limitations should be presumed to be known to the agent and the applicant alike and must be complied with by both.<sup>1</sup> A distinction, however, is to be made between the requirements of the charter and those of the by-laws and between provisions that go to the essence of the contract and those that are directory merely.<sup>2</sup>

§ 158. **The Correct Doctrine as to the Authority of Insurance Agents Stated in Certain Cases.**—The correct doctrine in regard to the authority of insurance agents is laid down in a decision of the Court of Appeals of Maryland,<sup>3</sup> taken in connection with the modifications stated by the Supreme Court of Pennsylvania.<sup>4</sup> In the former the following was cited with approval from a standard work on insurance:<sup>5</sup> “In all cases where the assured has notice of any limitation upon the agent’s power, or where there is anything about the transaction to put him on inquiry as to the actual authority of the agent, acts done by him in ex-

<sup>1</sup> *Susquehanna Ins. Co. v. Perrine*, 7 W. & S. 348; *Eilenberger v. Protective, etc., Ins. Co.*, 89 Pa. St. 464; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Belleville Mut., etc., Ins. Co. v. Van Winkle*, 1 Beas. (N. J.) 333; *Hellenberg v. District No. 1, etc.*, 94 N. Y. 580; *Eastman v. Provident, etc., Assn. (N. H.)*, 20 Cent. L. J. 580.

<sup>2</sup> *Cumberland, etc., Ins. Co. v. Schell*, 29 Pa. St. 31; *Priest v. Citizens, etc., Ins. Co.*, 3 Allen, 602; *Hale v. Mech., etc., Ins. Co.*, 6 Gray, 169; *s. c.* 66 Am. Rep. 410; *Brewer v. Chelsea Ins. Co.*, 14 Gray, 203; *Leonard v. American Ins. Co.*, 97 Ind. 299.

<sup>3</sup> *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

<sup>4</sup> *Eilenberger v. Protective, etc., Ins. Co.*, 89 Pa. St. 464.

<sup>5</sup> *Wood on Ins.*, § 387.



cess of his authority are not binding, as where it is generally known that limitations are imposed in certain respects. So, where direct notice, or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has the right to limit the powers of its agents must be conceded, and when it does impose such limitations upon his authority, in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." In the Pennsylvania case the court said that no case "declares that the fraud or mistake of a knavish or blundering agent, done within the scope of the powers given him by the company, will enable the latter to avoid a policy to the injury of the assured, who innocently became a party to the contract. The authorities go far, very likely not too far, in holding the assured responsible for his warranty, and in excluding oral evidence to contradict or vary it; but they do not establish that where an agent of the assurer has cheated the assured into signing the warranty and paying the premium, and the policy was issued upon the false statements of the agent himself, the assured shall not prove the fact and hold the principal to the contract, as if he had committed the wrong. The defendant is a mutual company, and holders of its policies are members. Membership dates from consummation of the contract, and not before. During negotiations for insurance, a mutual company occupies no other or better position than one organized on the stock plan, and cannot profit by a contract induced by the fraud of its agent; for the membership arises from, but does not precede the contract.<sup>1</sup> As to all preliminary negotiations, the agent acts only on behalf of the company. A stipulation in a policy that if the agent of the company, in the

<sup>1</sup> *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223.

transaction of their business, should violate the conditions, the violation shall be construed to be the act of the insured, and shall avoid the policy, will not render the insured responsible for the mistakes of the agent.<sup>1</sup> This was said where the mistake was of representations, and does not qualify the rule which holds the assured upon his covenants or warranties. But it shows that a company contracting by its agent will not always escape the consequences of the fraud or mistake of its agent, by inserting a stipulation in the policy that such agent shall be deemed the agent of the insured, who, at the time of applying for the policy, was ignorant of the insurer's intention to so stipulate." We can see no reason why this rule should not apply to mutual benefit societies wherever the facts are analogous.<sup>2</sup>

§ 159. **How far Knowledge of Agent Binds Principal.** — It is also an important inquiry how far the knowledge of the agent of an insurer is to be deemed that of his principal. The subject is necessarily closely connected with that of the application and the powers of agents generally to waive conditions and by their conduct to estop the company or society. It is sufficient to state briefly what is considered the true principle. In the absence of a written application, containing representations or warranties, where an agent, upon his own knowledge or investigation, reports a certain state of facts upon which the policy or certificate is issued, then, in the absence of any attempt to mislead on the part of the insured, the principal is bound by the acts of the agent.<sup>3</sup> Again, material errors committed by the agent, or omissions of the agent in stating material

<sup>1</sup> *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

<sup>2</sup> *Ante*, § 153.

<sup>3</sup> *Cumberland Valley, etc., Ins. Co. v. Schell*, 29 Pa. St. 31; *Meadowcraft v. Standard F. Ins. Co.*, 61 Pa. St. 91; *Caston v. Monmouth Mut. F. Ins. Co.*, 54 Me. 170; *Comml. Ins. Co. v. Ives*, 56 Ill. 402; *Brink v. Merchants', etc., Ins. Co.*, 49 Vt. 442.

facts, in the absence of fault upon the part of the insured would affect the principal with the knowledge of the agent.<sup>1</sup> Or, if a mutual mistake was made, on general principles, equity would relieve the insured, either before or after loss, if he had acted in good faith,<sup>2</sup> as it certainly would in case of fraud on the part of the agent, if circumstances existed from which the authority of the agent could reasonably be inferred.<sup>3</sup> If, however, the agent and the insured, both knowing material facts, agree to conceal or omit them from the application, then their acts amount to fraud and the principal is not bound. As was said by the Supreme Court of Pennsylvania: <sup>4</sup> “ Smith’s case <sup>5</sup> rests upon a doctrine that ought to prevail everywhere, to wit: ‘ The principal is bound by the acts of his agent whilst he acts within the scope of the deputed authority; but if, departing from that sphere, or continuing in it, he commits a fraud upon his principal, a *particeps criminis* shall not profit by the fraud.’ ” <sup>6</sup>

§ 160. Notice to Agent. — Often, under the provisions of the contracts of insurance companies and benefit societies, notice is required to be given of certain facts under specified contingencies. The general rule is that if the notice be given to the board of directors, or to any officer or

<sup>1</sup> Campbell v. Merchants’, etc., Ins. Co., 37 N. H. 65; 72 Am. Dec. 324; Behler v. German Ins. Co., 68 Ind. 353; Beebe v. Hartford, etc., Ins. Co., 25 Conn. 51; 65 Am. Dec. 553; Commercial Fire Ins. Co. v. Allen (Ala.), 1 South. Rep. 202; Howard Ins. Co. v. Bruner, 23 Pa. St. 50; May on Ins., § 132.

<sup>2</sup> Franklin F. Ins. Co. v. Martin, 40 N. J. 568; 8 Ins. L. J. 134; May on Ins., § 145; In re Universal Non-Tariff Ins. Co., L. R. 19 Eq. 385; *post*, § 278.

<sup>3</sup> McLean v. Equitable L. A. Soc., 100 Ind. 127; Union Mut. Ins. Co. v. Slee, 110 Ill. 35.

<sup>4</sup> Eilenberger v. Protective, etc., Ins. Co., 89 Pa. St. 464.

<sup>5</sup> Smith v. Insurance Co., 24 Pa. St. 320.

<sup>6</sup> New York L. Ins. Co. v. Fletcher, 117 U. S. 519; Ryan v. World Mut. L. Ins. Co., 41 Conn. 168.

agent of the company, whose duty by the by-laws, resolutions and usages of the company, is to communicate it to the directors or managing officials of the company, it is sufficient. "Notice of facts to an agent is constructive notice thereof to the principal himself, when it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal, having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party."<sup>1</sup> This rule has been applied to insurance companies, as for example, to cases where true answers have been given to the agent in filling up an application for life insurance but the agent has not correctly stated the answer;<sup>2</sup> and as to notice of prior or other insurance, or of an incumbrance.<sup>3</sup> In one case it was said:<sup>4</sup> "The notion that a corporation can only act under their corporate seal and by their president and secretary, has become obsolete. Unless they may be bound by the acts and admissions of their officers and agents acting in the ordinary affairs of the corporation, so far as relates to the business usually transacted by such officers and agents, they would enjoy an immunity incompatible with the rights of individuals and destructive of the object of their creation." Where there is nothing but a provision in general terms for a notice, without prescrib-

<sup>1</sup> Story on Ag., § 140.

<sup>2</sup> Insurance Co. v. Wilkinson, 13 Wall. 222; Miller v. Mutual Ben. Life Ins. Co., 31 Ia. 216; 7 Am. Rep. 122. *Contra*, Vose v. The Eagle L. & H. Ins. Co., 6 Cush. 42.

<sup>3</sup> New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Rowley v. Empire Ins. Co., 36 N. Y. 550; Peck v. New London Mut. Ins. Co., 22 Conn. 575.

<sup>4</sup> N. E. Fire & M. Ins. Co. v. Schettler, 38 Ill. 171.

ing, either in terms, or by necessary implication, the mode in which it should be given, a verbal notice is good, unless the notice be in a legal proceeding, in which case it should be in writing.<sup>1</sup> For the protection of the assured and to prevent fraud, authority of an agent to do a particular act will often be presumed, although the requirements of the charter or by-laws as to matters of form have not been strictly complied with.<sup>2</sup>

<sup>1</sup> *McEwen v. Montgomery County, etc., Ins. Co.*, 5 Hill, 101; *Sexton v. Montgomery County, etc., Ins. Co.*, 9 Barb. 191; *Gilbert v. Columbia Turnpike Co.*, 3 Johns. Cas. 107; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 216; 7 Am. Rep. 124; *post*, § 405.

<sup>2</sup> *Masters v. Madison, etc., Ins. Co.*, 11 Barb. 624; *New Eng. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 216. (The subject of the powers and authority of agents of insurance companies is farther considered in treating of matters relating to the application, § 221, *et seq.*; those concerning payment of premiums, § 367, *et seq.*; those involving questions of notice, etc., in proofs of loss, §§ 405, 408, *et seq.*; and in discussing the subjects of waiver and estoppel, §§ 426, 428, *et seq.*)

## CHAPTER V.

### NATURE AND SUBJECT-MATTER OF CONTRACT: AFTER ENACTED LAWS.

- § 161. Contract of Benefit Society with Members, Where Found.
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§ 161. Contract of Benefit Society with Members, Where Found. — The principal object of all benefit socie-

ties is to confer certain advantages upon their members and pay to them or their beneficiaries specified benefits. The understanding between the association and the individuals who compose it, as to the membership, the duties imposed on members and the benefits to be bestowed on them is a contract. The authorities are not clear as to where this contract is to be found in cases where a certificate is issued to the member, whether in such certificate, in the laws of the society, or in both. The Court of Appeals of New York, in a case involving the right to recover a death benefit, said: <sup>1</sup> "The charter and by-laws of the defendant corporation constituted the terms of an executory contract to which the testator assented when he accepted admission into the order." In a similar case the Supreme Court of Wisconsin said: <sup>2</sup> "The constitution and by-laws certainly contain the contract which was entered into by the parties." On the other hand, it is asserted in some cases, that the certificate of membership contains the contract. In a case in the Federal court in Iowa <sup>3</sup> it was said: "The contract is contained in the certificates;" the Supreme Court of Indiana also says, in a case where the benefit of a beneficiary society was in dispute: <sup>4</sup> "The certificate, although issued by a mutual benefit association is, in legal contemplation, a policy of insurance, and is in most respects governed by the general rules of law which apply to insurance contracts." <sup>5</sup> In another case <sup>6</sup> the same court says: "The essential difference between a certificate in a beneficiary association and an ordinary life policy is, that in the latter the rights of the beneficiary are fixed by the terms of the policy, while in

<sup>1</sup> *Hellenberg v. District No. 1, I. O. O. B.*, 94 N. Y. 580.

<sup>2</sup> *Schunck v. Gegenzeiten, etc.*, 44 Wis. 375.

<sup>3</sup> *Worley v. Northwestern Masonic Aid Assn.*, 10 Fed. Rep. 228.

<sup>4</sup> *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593.

<sup>5</sup> *Bauer v. Sampson Lodge*, 102 Ind. 262; *Elkhart M. Aid Assn. v. Houghton*, 98 Ind. 149; *Sup. Commandery, etc., v. Ainsworth*, 71 Ala. 443; *Supreme Lodge v. Schmidt*, 98 Ind. 374.

<sup>6</sup> *Masonic, etc., Ben. Soc. v. Burkhart*, 110 Ind. 192.

the former they depend upon the certificate and the rights of the member under the constitution and by-laws of the society." In an action to recover a sick benefit, no certificate having been issued, the Supreme Court of Massachusetts said: <sup>1</sup> "The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident. If it refuses to perform its contract, *contained in the by-laws*, the member who is injured may have recourse to the proper courts to enforce the contract." There is still another view. In a case, where the promised benefit of a beneficiary society was involved, the Supreme Court of New Hampshire said: <sup>2</sup> "The charter, by-laws and certificate of membership, taken together, show what was the understanding of the parties." To the same effect is the statement in a similar case in Kentucky,<sup>3</sup> wherein the Court of Appeals said: "The certificate of membership constitutes the contract; but it is to be construed and governed by the company's charter. In fact, it may be said that the charter is a part of the contract; and if it declares who, in a certain event, shall be the beneficiary, the parties cannot alter this legislative direction, because neither the company nor the insured can do anything in violation of it." In a similar case in Texas<sup>4</sup> this view is also taken. The document issued to the members of a benefit society must be such as its laws prescribe; it is usually a certificate which recites that the person named therein is a member of the society and "entitled to all the rights and privileges of membership" and to participate in its beneficiary fund to a specified amount, which shall be paid at his death, if then a member in good standing, to a named person, on condition that such member shall, in every particular, while

<sup>1</sup> Dolan v. Court of Good Samaritan, 128 Mass. 437.

<sup>2</sup> Eastman v. Provident M. Relief Assn., 20 Cent. L. J. 266 (1883).

<sup>3</sup> Van Bibber v. Van Bibber, 82 Ky. 350.

<sup>4</sup> Splawn v. Chew, 60 Tex. 535.



a member of the society, comply with its laws, rules and requirements. This certificate is in the nature of an insurance policy issued by a mutual company.<sup>1</sup> If the certifi-

<sup>1</sup> In the following cases full copies of the certificates sued on are given: Grand Lodge A. O. U. W. v. Child (Mich.), 14 West. Rep. 454; 38 N. W. Rep. 1; Wendt v. Iowa Legion of Honor (Ia.), 34 N. W. Rep. 471; Supreme Lodge Knights of Honor v. Johnson, 78 Ind. 110; Richmond v. Johnson, 28 Minn. 447; Supreme Lodge Knights of Pythias v. Schmidt, 98 Ind. 374; Royal Templars of Temperance v. Curd, 111 Ill. 286; Holland v. Taylor (Ind.), 12 N. E. Rep. 116; 9 West. Rep. 606; Supreme Commandery, etc., v. Ainsworth, 71 Ala. 437. The certificate in the case first above cited (Grand Lodge v. Child) was as follows:—

“Grand Lodge Ancient Order of United Workmen of Michigan.

“No. 39.

\$2000.

“This certificate, issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, witnesseth, that Brother George J. Child, a master workman degree member of Unity Lodge No. 9 of said order, located at Detroit, in the State of Michigan, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participate in the beneficiary fund of the order, to the amount of two thousand dollars, which sum shall, at his death, be paid to Susan Drury. This certificate is issued upon the express condition that said George J. Child shall, in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof.

“In witness whereof the Grand Lodge of Michigan has caused this to be signed by its Grand Master Workman and Recorder, and the seal thereof to be attached, this 19th day of September, 1878.

“[SEAL OF GRAND LODGE.]

“GEO. H. PENNINGTON,

“Grand Master Workman.

“Attest:

“W. WARNE WILSON, *Grand Recorder*.

“We, the undersigned, Master Workman and Recorder of Unity Lodge No. 9, do hereby countersign this certificate, and attach the seal of this lodge hereto, rendering the same valid and in full force, this 19th day of September, 1878.

“[SEAL OF SUBORDINATE LODGE.]

“THOMAS J. CROWE,

“Attest:

“Master Workman.

“JOHN GALLOWAY, *Recorder*.”

In Holland v. Taylor (*supra*) the certificate was as follows:—

“Royal Arcanum Benefit Certificate.

“This certificate is issued to Charles D. Taylor, a member of Hoosier Council No. 394, Royal Arcanum, located at Indianapolis, Ind., upon

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cate refers to the laws of the order in such a way as to make them a part of it, then, of course, they are to be considered as a part of the contract but if the charter is in general terms and simply provides that the society may conduct the business of paying benefits to its members, and, if the by-laws contain no restrictions or limitations, then the whole of the contract would be in the certificate. The conclusion, from an examination of all the cases, is that the contract is found in the certificate, if one is issued, but is to be construed and governed by the charter and by-laws of the society, and the statutes of the State of the domicile of the corporation.<sup>1</sup>

evidence received from said council that he is a contributor to the widows and orphans' benefit fund of this order; and upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the Supreme Secretary's office, be made a part of the contract; and upon condition that the said member complies, in the future, with the laws, rules, and regulations now governing said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund. The conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay, out of its widows and orphans' benefit fund, to Samuel Taylor and Martin V. McGilliard (executors) for the benefit of Anna Laura Taylor (daughter), a sum not exceeding \$3,000, in accordance with and under the provisions of the laws governing the said fund, upon satisfactory evidence of the death of said member, and upon the surrender of this certificate, provided that the said member is in good standing in this order at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request in accordance with the laws of this order.

" In witness whereof, the Supreme Council of the Royal Arcanum has hereunto affixed its seal, and caused this certificate to be signed by its Supreme Regent, and attested and recorded by its Supreme Secretary, at Boston, Massachusetts, this 25th day of August, 1884.

" JOHN HASKELL BUTLER, *Supreme Regent.*

" Attest:

" W. O. ROBSON, *Supreme Secretary.*"

<sup>1</sup> *Miner v. Mich. Mut. Ben. Assn.* (Mich.), 29 N. W. Rep. 852; 6 West. Rep. 117; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Maryland Mut.*

§ 162. **Is One of Insurance.** — This contract, whether found in the certificate alone, or gathered from the certificate, charter and by-laws, is one of insurance. The Supreme Court of Massachusetts has made this very clear in the leading case of *Commonwealth v. Wetherbee*,<sup>1</sup> in which it said: “A contract of insurance is an agreement, by which one party, for a consideration (which is usually paid in money, either in one sum or at different times, during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest. In fire and marine insurance, the thing insured is property; in life or accident insurance, it is the life or health of a person. In either case, neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurer, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract. The contract made between the Connecticut Mutual Benefit Company and each of its members by the certificates of membership issued according to its charter, does not differ in any essential particular of form or substance from an ordinary policy of mutual life insurance. The subject insured is the life of the member. The risk insured is death from any cause not

*Ben. Assn. v. Clendinen*, 44 Md. 429; *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550; 57 Am. Dec. 300; *Masonic Relief Assn. v. McAuley*, 2 Mackey, 70; *Simeral v. Dubuque, etc., Ins. Co.*, 18 Ia. 319; *Mitchell v. Lycoming, etc., Ins. Co.*, 51 Pa. St. 402; *Susquehanna, etc., Ins. Co. v. Perrine*, 7 W. & S. 348; *Grand Lodge, etc., v. Elsner*, 26 Mo. App. 109; *McMurry v. Supreme Lodge, etc.*, 20 Fed. Rep. 107; *National Ben. Assn. v. Bowman*, 110 Ind. 355. Also cases cited just previously.

<sup>1</sup> 105 Mass. 149.

excepted in the terms of the contract. The assured pays a sum fixed by the directors and not exceeding ten dollars, at the inception of the contract, and assessments of two dollars each annually, and of one dollar each upon the death of any member of the division to which he belongs, during the continuance of the risk. In case of the death of the insured by a peril insured against, the company absolutely promises to pay to his representatives, in sixty days after receiving satisfactory notice and proof of his death, 'as many dollars as there are members in' the same division, the number of which is limited to five thousand. The payment of this sum is subject to no contingency but the insolvency of the corporation. The means of paying it are derived from the assessments collected upon his death from other members; from the money received upon issuing other certificates of membership, which the by-laws declare, may, after payment of expenses, be 'used to cover losses caused by the delinquencies of members;' and from the guaranty fund of one hundred thousand dollars, established by the corporation under its charter. This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because, in case of non-payment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end, and all moneys previously paid by the assured, and all dividends and credits accrued to him, to be forfeited to the company. The fact, offered to be proved by the defendant, that the object of the organization was benevolent and not speculative, has no bearing upon the nature and effect of the business conducted and the contracts made by the corporation." This definition and

application have been generally cited with approval by the courts of other States which have, practically without exception, held that the contracts of benefit societies whether the agreed sum is to be paid upon the sickness or disability of the member to him in person, or upon his death to his designated beneficiary, is one having all the characteristics of an insurance contract.<sup>1</sup> In an action brought to recover the benefit promised by a benefit society on the death of a member, the Supreme Court of Alabama said:<sup>2</sup> “The instrument in writing upon which this suit is founded, and which is set out in full in the complaint, entitled a ‘Knight’s Benefit Certificate,’ has the elements and characteristics of a contract of life insurance. It purports to have been issued by the Supreme Commandery of the Knights of the Golden Rule, which is averred to be a corporation, created and organized under a law of the State of Kentucky. The commandery thereby promises, on the death of the husband of the appellee, to pay her two thousand dollars, in consideration of the husband having become a member of the order, and having paid the fee for admission to membership and of his payment in the future of all assessments levied and required by the supreme commandery, upon the condition that he remained a member of the order, in good standing, and complied with all the laws then in force or subsequently enacted. These are the essential elements of a contract of life insurance, made by a mutual insurance company with one of its members. Life is the risk and death is the event upon which the insurance money is payable. There is not, as in ordinary contracts or poli-

<sup>1</sup> *Endowment & Ben. Assn. v. State*, 35 Kan. 253; *State v. Merchants’ Exchange, etc.*, 72 Mo. 146; *Bolton v. Bolton*, 73 Me. 299; *Folmers’ Appeal*, 87 Pa. St. 133; *State v. Bankers, etc.*, 23 Kan. 499; *Miner v. Mich. Mut. B. Ass. (Mich.)*, 6 West. Rep. 117; 29 N. W. Rep. 852; *State v. Farmers & Mech., etc., Assn.*, 18 Neb. 276; *Supreme Commandery, etc., v. Ainsworth*, 71 Ala. 443; *ante*, §§ 51 and 52.

<sup>2</sup> *Supreme Commandery, etc., v. Ainsworth*, 71 Ala. 443.

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cies, a stipulation for the payment of premiums fixed and certain in amount, at the inception of the risk, and at periods, definitely appointed, during its continuance. The payment of the fee for admission to membership, and of the assessments levied and required by the commandery, are the equivalent of premiums, and form the pecuniary consideration of the contract. The condition expressed, that the assured shall remain a member of the order in good standing, observing its laws, is the expression of that which is implied in all insurance of members by mutual companies. The members of such companies are presumed to know the charter and by-laws, and to contract in reference to them though they may not be recited or referred to in the contract.”<sup>1</sup>

§ 163. **A Life Insurance Contract is not Strictly one of Indemnity.** — A contract of insurance is ordinarily one of indemnity; that is, the insurer agrees that upon the damage, loss or destruction of something he will, in the agreed way, indemnify the insured. It has been vigorously contended that a contract of life insurance is also one of indemnity, as much as fire or marine insurance. Mr. May, for example, in his treatise on insurance,<sup>2</sup> says: “In the one case, the insurance is against the loss of capital, which produces income; in the other, it is against the loss of faculties, which produce income.” And again:<sup>3</sup> “It (the contract) can never, therefore, properly be entered into except for the purpose of security or indemnity; though the fact that the contract may, under certain circumstances, result as a profitable investment, does not vitiate it, if entered into in conformity to the principles which underlie it. But so far as it seeks any other object than indemnity for loss,

<sup>1</sup> *Holland v. Taylor* (Ind.), 12 N. E. Rep. 116; 9 West. Rep. 606; *Farmer v. State* (Tex.), 7 S. W. Rep. 220.

<sup>2</sup> § 7.

<sup>3</sup> § 117.

it departs from the legitimate field of insurance, and engrafts upon the contract a purpose foreign to its nature.” And yet the same author has said<sup>1</sup> that life insurance “in some of its phases, is not merely a contract of indemnity, but includes that with a possibility of something more.” In *Dalby v. The India and London Life Ass. Co.*,<sup>2</sup> it was said of life insurance that it “in no way resembles a contract of indemnity,” and Baron Parke again, in referring to the fact that Lord Mansfield decided the case of *Godsall v. Boldero*<sup>3</sup> on the theory that a life insurance contract was like one of marine insurance, one for indemnity only, says: “But that is not of the nature of what is termed an assurance for life; it really is what it is on the face of it, — a contract to pay a certain sum in the event of death?” The Supreme Court of the United States<sup>4</sup> cites this case and approves its reasoning, saying: “In life insurance the loss can seldom be measured by pecuniary values.” We must conclude, therefore, that, though sometimes, as where a creditor insures the life of his debtor, the contract is in the nature of an indemnity, still, strictly speaking, a life insurance contract is not generally one of indemnity.<sup>5</sup> Public policy, however, forbids a person to take out a policy of insurance upon the life of another in the continuance of which he has no expectation of advantage or pecuniary interest, because such policies are in the nature of wagers upon human life and are gambling transactions. Moreover they furnish a strong inducement to the person holding such insurance to hasten the termination of the life of the insured.<sup>6</sup>

<sup>1</sup> May on Ins., § 117.

<sup>2</sup> 15 C. B., 365; 24 L. J. C. P. 2.

<sup>3</sup> 9 East, 72.

<sup>4</sup> *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457.

<sup>5</sup> See *Scott v. Dickson*, 108 Pa. St. 6; *Ferguson v. Mass. M. L. Ins. Co.*, 32 Hun, 306; 102 N. Y. 647.

<sup>6</sup> *Post*, § 248, for a discussion of the subject of insurable interest.

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§ 164. **Is Executory and Personal.**—This contract is executory and personal in its nature. Of a fire insurance policy the Supreme Court of Ohio said:<sup>1</sup> “It is a mere personal indemnity against loss to the person with whom it is made, or those falling within the scope of its provisions. As soon as the interest of such person ceases in the property the contract is at an end, from the impossibility of any loss happening to him afterwards. It is not assignable without the consent of the insurer.”<sup>2</sup> So far as the principle of the foregoing statement just cited applies to life insurance policies it is incorrect. The question of personality is of great importance in cases of fire insurance where restraints on alienation are insisted on, but in life insurance contracts it is of less importance. It is settled doctrine that a life policy originally valid does not cease to be so by the cessation of the interest of the party assured in the life of the insured.<sup>3</sup> The contract however, must be considered personal, because generally not assignable without the consent of the insurer.<sup>4</sup> The contract falls strictly within the definition of those that are executory; on the one hand, certain assessments or premiums are to be paid, on the other side, it is to be executed by the payment of the sum insured when the contingency occurs.<sup>5</sup>

§ 165. **Is Aleatory.**—Another characteristic of the contract is that it is what the French writers call *aleatory*, “or one in which the equivalent consists in the chances for gain

<sup>1</sup> McDonald v. Black's Admr., 20 Ohio St. 185; 55 Am. Dec. 448.

<sup>2</sup> Glendale Woolen Co. v. Protection Ins. Co., 21 Conn. 19; 54 Am. Dec. 309; Morrison's Admr. v. Tennessee, etc., Ins. Co., 18 Mo. 262; 59 Am. Dec. 305 and note.

<sup>3</sup> Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; *post*, § 253.

<sup>4</sup> For discussion of the assignability of life insurance policies and change of beneficiary, see Chap. IX.

<sup>5</sup> Mutual Life Ins. Co. v. Wager, 27 Barb. 354; Hellenberg v. District No. 1, I. O. O. B. B. 94 N. Y. 586; New York L. Ins. Co. v. Statham, 93 U. S. 24.



or loss, to the respective parties, depending upon an uncertain event, in contradistinction from a commutative contract in which the thing given or act done by the party is regarded as the exact equivalent of the money paid or done by the other."<sup>1</sup> In other words the parties take chances as they do in throwing dice; if, as example in cases of life insurance for specified terms, the assured lives the company makes the premium which the party paying it loses, but if the assured dies within the time specified then the company loses the amount contracted for.

§ 166. **Life Insurance Policies are Valued Policies.** — Regarding the certificate of membership as a contract similar to a life insurance policy, it is what is termed a "valued" policy, which the Supreme Court of Pennsylvania says:<sup>2</sup> "Is not understood to be one which estimates the value of the property insured merely, but which values the loss, and is equivalent to an assessment of damages in the event of a loss."<sup>3</sup> In this sense all policies of life insurance, or benefit certificates, are valued policies, for all specify the amount which the insurer is to pay without question as to the money value of the interest destroyed. And the policy is not to be considered as open as to the amount because the amount payable is to be determined by the number of members of a certain class, or of the society.

§ 167. **Endowment Insurance is Life Insurance.** — "The term, life insurance, is not alone applicable," says the Supreme Court of California,<sup>4</sup> "to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain

<sup>1</sup> May on Ins., § 5.

<sup>2</sup> Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 372.

<sup>3</sup> Chisholm v. Nat. Capitol L. Ins. Co., 52 Mo. 213; 14 Am. Rep. 414.

<sup>4</sup> Briggs v. McCullough, 36 Cal. 550.

age. It is simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form, it is, strictly speaking, an insurance on the life of the party. In this case the policy was to become payable on the death of McCullough, provided he died within ten years, and it is to that extent certainly an insurance on his life. It is an undertaking to pay the stipulated sum if he shall die within a specified term, which is of the very essence of life insurance. The fact that the company is to pay the agreed sum at the expiration of ten years, even though McCullough shall not have died in the meantime, does not divest it of its character of life insurance. It is only a new and additional element in the contract not inconsistent with its other, which is its chief constituent part, to wit, the undertaking to pay on the death of the assured within the specified term.”<sup>1</sup>

§ 168. **Benefit Societies Restricted as to Beneficiaries.** — Benefit societies differ from other mutual insurance organizations in that their charters generally impose restrictions upon the issue of certificates by limiting the persons who may be beneficiaries of the members to those who are heirs, relatives or dependents of such members. Wherever these restrictions are imposed by statute, or contained in the charter of the society, it has no power to pass beyond them by issuing a certificate in which any one other than of the specified classes is beneficiary. The Court of Appeals of Kentucky early established this doctrine when it said:<sup>2</sup> “The charter prescribes who may become mem-

<sup>1</sup> *Endowment and Benev. Assn. v. The State*, 35 Kan. 262; *Carter v. John Hancock Mut. L. Ins. Co.*, 127 Mass. 153.

<sup>2</sup> *Kentucky Masonic, etc., Ins. Co. v. Miller's Admr.*, 13 Bush, 489.

bers of the company, and their obligations, and who shall be the beneficiaries of the membership after the death of the member, and it is not in the power of the company or of the member, or of both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent therein indicated.” This rule was approved by the Supreme Court of Massachusetts,<sup>1</sup> which says: “The statute under which the plaintiff corporation is organized gives it authority to provide for the widow, orphans, or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated and the corporation has no authority to create a fund for other persons than of the classes named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart to await the death of the member, and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life, and if no one is so selected, it is still payable to one of the classes named. \* \* \* If the fund were subject to testamentary bequest, then, upon the decease of the member, it might go into the hands of his executor, or the administrator of his estate, and become assets thereof liable to be swallowed up by the creditors. If there were no creditors, the member by his will could divert it from the three classes named in the statute. In either case, this would defeat the purpose for which the fund was raised and held, and would be in direct conflict with the object of the statute for which the association was formed, and would set aside the contract entered into between the member and the corporation.” And the principle thus established has been generally approved and followed.<sup>2</sup> If, however, no restrictions are imposed by

<sup>1</sup> American Legion of Honor v. Perry, 140 Mass. 589.

<sup>2</sup> Elsey v. Odd-fellows, etc., Assn., 142 Mass. 224; Presbyterian, etc.,

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charter or statute the society may constitute any one the beneficiary of a member.<sup>1</sup>

§ 169. Where Contract is Executed Society may be Estopped. — If, however, a contract with a member has become executed by the death of such member it has been held that, although the beneficiary was not of one of the prescribed classes that fact cannot be set up to defeat the claim.<sup>2</sup>

§ 170. Liberality of Construction of Charter by some Courts. — In some cases the courts have not been disposed to adhere strictly to the letter of the constitution or charter as where the Supreme Court of Pennsylvania said, in a case where the benefit was made payable to a creditor of the member: <sup>3</sup> “The learned court below was of opinion that there was a fatal conflict between the charter and the constitution in respect of the persons who may receive benefits from the defendant company, and for that reason alone refused judgment to the plaintiff. The second section of the charter upon which this conclusion is based is in the following words: ‘The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members.’ Construing these words the learned court below held that it was not within the power of the defendant to stipulate

*Fund v. Allen*, 106 Ind. 593; *National, etc., Assn. v. Gonser*, 43 Ohio St. 1; *Benef. Soc. v. Dugre*, 11 R. L. (Queb.) 344; *State v. People's M. Ben. Assn.*, 42 Ohio St. 579; *Knights of Honor v. Nairn* (Mich.), 26 N. W. Rep. 826; *Leonard v. American Ins. Co.*, 97 Ind. 305; *post*, §§ 244, 245.

<sup>1</sup> *Massey et al. v. Mutual Relief, etc., Soc.*, 102 N. Y. 523; *Mitchell v. Grand Lodge, etc. (Ia.)*, 30 N. W. Rep. 865; *Swift v. Railway, etc., Assn.*, 96 Ill. 309; *post*, § 246.

<sup>2</sup> *Bloomington Mut., etc., Assn. v. Blue*, 120 Ill. 127; *Lamont v. Grand Lodge, etc.*, 31 Fed. Rep. 177; *post*, § 265. But see *Mut. Ben. Assn. v. Hoyt*, 46 Mich. 473.

<sup>3</sup> *Maneely v. Knights of Birmingham (Pa.)*, 7 Cent. Rep. 633; 9 Atl. Rep. 41.

for the payment of the benefits to any person other than the widow and orphans, who might be designated as the recipient by the deceased under article 19 of the constitution. We think this is too narrow and strained a view to take of the second section of the charter quoted above. While it is true that the general purpose of the corporation is there stated to be the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished and which doubtless is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widow or orphans.”<sup>1</sup> This decision carries to its extreme limits the doctrine that the laws of benevolent societies must be construed liberally to carry out the kindly objects of their creation,<sup>2</sup> but this construction has not evidently been received with favor in other courts where a stricter rule has been laid down.<sup>3</sup>

**§ 171. Contracts of Mutual Companies where a By-Law has been Violated.** — It is an important consideration where some requirement of the by-laws of a mutual organization, like a benefit society, has been disregarded in the contract, to what extent the validity of the contract is affected. The question has arisen in actions against mutual fire insurance companies where the provisions of the by-laws have been violated, as for example in regard to subsequent insurance, incumbrances on the property and classification of risks.<sup>4</sup> The Supreme Court of Massa-

<sup>1</sup> *Supplee v. Knights of Birmingham*, 18 W. N. C. 280; *post*, § 245.

<sup>2</sup> *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 381; *Ballou v. Gile*, 50 Wis. 614; *Erdmann v. Ins. Co.*, 44 Wis. 376; *Covenant Mut. B. Assn. v. Sears*, 114 Ill. 108; *American Legion of Honor v. Perry*, 140 Mass. 580.

<sup>3</sup> *Post*, § 244.

<sup>4</sup> *Post*, §§ 426, 428.

chusetts has distinguished mutual from stock companies in this respect on the ground that members of mutual organizations are bound to know, their laws, which were intended to regulate and fix by the same stipulations in every policy, the rights of all the assured alike, and the officers being special agents with powers limited and defined by these laws, cannot virtually suspend them when matters touching the substance or essence of the contract are involved. This doctrine has been followed in a large number of cases.<sup>1</sup> But other authorities hold that not only is a distinction to be made between matters which go to the substance and those which affect the form of the contract, but also between those that are mandatory, and others which are only directory requirements. In a case in New Hampshire, where the charter vested all powers relating to contracts in the directors and directed them to divide property insured into classes, and after by-laws had been made establishing a rule for the division of risks, the directors knowingly insured property in one class which properly fell in another the Supreme Court of that State said: <sup>2</sup> "The by-law cannot be regarded as a limitation and restriction of a power which is lodged by the charter in the directors. It can have no higher effect than instructions, or a general regulation, adopted by the directors themselves, as a convenient guide in ordinary cases. The action of the directors is, in this case, the action of the corporation; the corporation could act on this subject in no other way than through the directors, and, as a general rule, mutual fire insurance companies have power to waive provisions of their by-laws which have been introduced for the benefit and protection of the com-

<sup>1</sup> *Brewer v. Chelsea, etc., Ins. Co.*, 14 Gray, 209; *Evans v. Tri-Mountain Ins. Co.*, 9 Allen, 329; *Hale v. Mechanics', etc., Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Leonard v. Am. Ins. Co.*, 97 Ind. 305; *Behler v. German, etc., Ins. Co.*, 68 Ind. 354; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 150.

<sup>2</sup> *Union Mut. F. Ins. Co., v. Keyser*, 32 N. H. 313; 64 Am. Dec. 377.

pany. In this case the action of the directors may have been irregular, contrary to the established usage, and in violation of their own rules, and of the by-laws; but it was still within the scope of their authority, expressly conferred on them by the charter and therefore binding on the company.”<sup>1</sup> Two principles seem to govern where the requirements of the by-laws of a corporation have not been observed in making a contract; the first is that where an act has been done within the apparent scope of the authority of an agent the principal will not be heard to say that specific instructions have been violated, unless knowledge be brought home to the party.<sup>2</sup> The second principle is that where provisions in the by-laws of a corporation are for the benefit of the company they can be waived.<sup>3</sup> To this may be added the further doctrine that after a contract has been executed by the other side a corporation will generally not be allowed to deny its power to make such a contract or to contract by such an agent.<sup>4</sup>

§ 172. **Insurance Contract Need not be in Writing.** — Although in a few early cases it was said that a contract of insurance must be in writing, the validity of a parol insurance has been so frequently and uniformly affirmed that it is now the undoubted American doctrine. The reason is that

<sup>1</sup> *Fuller v. Boston, etc., Ins. Co.*, 4 Metc. 207; *Williams v. N. E. Mutual, etc., Ins. Co.*, 31 Me. 227; *Cumberland Valley, etc., Co. v. Schell*, 29 Pa. St. 37.

<sup>2</sup> *Emery v. Boston Marine Ins. Co.*, 138 Mass. 410; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Davenport v. Peoria, etc., Ins. Co.*, 17 Iowa, 276; *New England, etc., Ins. Co. v. Schettler*, 38 Ill. 166.

<sup>3</sup> *Cumberland Valley, etc., Ins. Co. v. Schell*, 29 Pa. St. 31; *Prince of Wales, etc., Co. v. Harding*, 1 E. B. & E. 183; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 221; *Splawn v. Chew*, 60 Texas, 532, *Manning v. Ancient Order United Workmen (Ky.)*, 5 S. W. Rep. 385; *Sanborn v. Ins. Co. (Ky.)*, 16 Gray, 448; 77 Am. Dec. 419. But see *post*, 307, 426.

<sup>4</sup> *New England, etc., Ins. Co. v. Schettler*, 38 Ill. 166; *Bloomington, etc., Assn. v. Blue*, 120 Ill. 127; *Lamont v. Grand Lodge, etc.*, 31 Fed. Rep. 177; *Fuller v. Boston, etc., Ins. Co.*, 4 Metc. 206.

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a contract of insurance is not different from any other, nor is it to be governed by any other rules than those which apply in individual transactions. It has been said that, by prescribing a manner of executing the policy, the charter does not exclude the oral engagement because the contract and the policy are not identical. While the doctrine of parol insurance has been most frequently applied to fire or marine contracts,<sup>1</sup> the same principle has been recognized as applying to life insurance.<sup>2</sup> There is no reason why this rule should not apply to the contracts of mutual benefit societies wherever the agreement has been entered into and completed, except as to the issuance of a certificate or policy. Although no cases are found deciding the express point, there is no question but that when a member has been received into a benefit society, where certain benefits are incident to membership, he would be entitled to the full benefit upon maturity of the right, although no certificate had been issued. But necessarily much depends upon the laws of the particular society.<sup>3</sup>

§173. What Constitutes Perfect Parol Contract of Insurance. — It has been established that to constitute a perfect parol contract all the elements of a perfect contract must be present.<sup>4</sup> An insurance contract, it has been said,<sup>5</sup> to be valid must contain five essential elements: the subject-

<sup>1</sup> *Commercial Mut. Ins. Co. v. Union Mut Ins. Co.*, 19 How. 318; *First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *North-western Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145; *Emery v. Boston Marine Ins. Co.*, 138 Mass. 398; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

<sup>2</sup> *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 219; *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 121.

<sup>3</sup> In *Bishop v. Empire Order Mut. Aid*, 43 Hun, 472, it was held that under the circumstances of that case the designation of a beneficiary was a condition precedent to the society's liability.

<sup>4</sup> *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Sanford v. Trust, etc., Ins. Co.*, 11 Paige Ch. 547.

<sup>5</sup> *Tyler v. N. A. Ins. Co.*, 4 Robt. 151.



matter, the risk, the amount, the duration and the premium. It is not necessary, however, that all these elements be settled by the express contract, for several may be settled by implication from the circumstances of the case, from habits of dealing, from the nature of the property and from previous arrangements.<sup>1</sup> So, if a member were received into a benefit society such reception would justify the assumption that the understanding was that he sought the benefit promised by the society and agreed to pay the amounts paid by other persons of his age. An insurance made without issue of a policy is to be regarded as made upon the terms and subject to the conditions in the ordinary forms of policies used by the company at the time.<sup>2</sup> So, upon analogy, a member being received into a society, the certificate to be issued is understood to be one in the usual form and containing the usual agreements. It may even be the custom under the laws of the order not to issue certificates to the members, in which case only the laws of the order are to be looked at for the contract.<sup>3</sup>

§ 174. **Informal Execution.** — Want of a seal does not vitiate a policy unless by the charter of the company a seal is essential to its validity,<sup>4</sup> and where the articles of an insurance association direct that its policies be signed by its president and countersigned by its secretary, the omission of the president to sign a policy otherwise valid, does not render the policy invalid.<sup>5</sup> So, in regard to the countersigning of a policy. On this point the Supreme Court of

<sup>1</sup> *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Train v. Holland, etc.*, Ins. Co., 62 N. Y. 598; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Cooke v. Aetna Ins. Co.*, 7 Daly, 555; *Walker v. Met. Ins. Co.*, 56 Me. 371; *Baile v. St. Joseph, etc., Ins. Co.*, 68 Mo. 617; *Stone v. Ins. Co.*, 78 Mo. 658.

<sup>2</sup> *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256; 94 Am. Dec. 65.

<sup>3</sup> *Grand Lodge v. Elsner*, 26 Mo. App. 108.

<sup>4</sup> *National Banking etc., v. Knaup*, 55 Mo. 154.

<sup>5</sup> *Union Insurance Co. v. Smart*, 60 N. H. 458.

Pennsylvania<sup>1</sup> says: "We incline also to the opinion that, notwithstanding the express terms of the policy, the countersigning by the agents is not under all circumstances essential. On an equitable interpretation of the whole transaction, it may become the duty of the court to dispense with a portion of the forms of contract, if it can find any reliable substitute for them, on the principle that cures defective execution of powers, where the intention to execute is sufficiently plain. This contract was to be complete when delivered by the agents of the defendants, and we regard the countersigning by the agents as the appointed evidence of its proper delivery. If we do not find this evidence, we must treat it as not delivered, unless we have other evidence, which we can regard as equivalent."<sup>2</sup> But it is otherwise where it is to be countersigned only upon the happening of a future event, as the payment of a premium.<sup>3</sup> On general principles it is hard to see why, if no policy need be issued in order to make the contract valid, the omission of a merely formal matter, the contract being otherwise complete, or supposed to be so, should have any effect upon it. Equity, it is believed, would always relieve in such cases, though at law the contract might be deemed incomplete. It has been held<sup>4</sup> that a new benefit certificate, issued to change the beneficiary, upon application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, is not invalid because not signed and sealed by the officers of the subordinate union.

<sup>1</sup> *Myers v. Keystone, etc., Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 462.

<sup>2</sup> *Norton v. Phoenix M. L. Ins. Co.*, 36 Conn. 503; *Kantrener v. Penn, etc., Ins. Co.*, 5 Mo. App. 581. But see *Badger v. Am. Pop. Life Ins. Co.*, 103 Mass. 244; *McCully v. Phoenix M. L. Ins. Co.*, 18 W. Va. 782.

<sup>3</sup> *Hardie v. St. Louis M. L. Ins. Co.*, 26 La. Ann. 242; *Ormond v. Mutual Life Assn. (N. C.)*, 1 S. E. Rep. 796.

<sup>4</sup> *Fisk v. Equitable Aid Union (Pa.)*, 11 Atl. Rep. 84; 9 Cent. Rep. 403.

§ 175. *Lex Loci* and *Lex Fori*. — It is undoubtedly true that agreements of insurance are not governed by different principles than those that apply to other engagements, for all alike are contracts to which in general the same rules are applicable.<sup>1</sup> Two general laws may be here laid down which are often applied, the one that of *lex loci*, which has been thus tersely stated:<sup>2</sup> “It is a general principle applying to contracts, made, rights acquired or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instrument of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it, and the legal rights and immunities acquired under it. This principle, though general, does not, however, apply where the parties at the time of entering into the contract, had the law of another kingdom in view, or where the *lex loci* is in itself unjust, *contra bonos mores*, or contrary to the public law of the State, as regarding the interests of religion or morality, or the general well-being of society. The *lex loci* is presumed to be the same as that of the forum unless shown to be otherwise.” The second general law is that of *lex fori* which Bouvier thus defines<sup>3</sup> “The form of remedies, modes of proceeding, and execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted.” In summing up the doctrine of *lex loci* and *lex fori* Bishop says:<sup>4</sup> “A judicial tribunal should, in the de-

<sup>1</sup> *St. John v. American Mut. L. Ins. Co.*, 2 Duer, 419; 13 N. Y. 31; 64 Am. Dec. 529.

<sup>2</sup> Bouvier L. D., tit. *Lex Loci*.

<sup>3</sup> Bouvier L. D., tit. *Lex Fori*.

<sup>4</sup> Bishop on Cont., § 1412.

cision of every question, follow the laws prescribed for it by the sovereignty under which it sits. But there is a comity of nations, as the term is, whereby it has become customary for the various governmental powers to respect one another's laws; so that, if a contract made in one country is drawn in question in another, the tribunals of the latter will, in the absence of any domestic rule or policy restraining, accept the foreign law as the domestic, for ascertaining its validity. But this rule stops short at every point where it would become subversive of the domestic law. The interpretation and effect of the contract are determined by the law of the place of its intended performance, whether at home or abroad; its discharge when by operation of law, by any law moving thereto, and having a jurisdiction over it. In enforcing the contract, the foreign procedure is never employed."<sup>1</sup> In insurance contracts the wording of the policy, or certificate, generally determines the place where it is made. If an application is sent direct to the home office and the policy or certificate is there made out and delivered, or mailed, to the applicant, the home office is the place of the contract.<sup>2</sup> Generally there is a provision in the policy or certificate that it shall not be binding until payment of premium, or countersigning by a local agent. In such case the place of countersigning and delivery is that of the contract.<sup>3</sup> The Federal court in Oregon happily stated the law on this point as follows: <sup>4</sup> "Generally speaking the validity of a contract is to be decided by the law of the place where it is made; and if valid or

<sup>1</sup> *Whitridge v. Barry*, 42 Md. 140; *Cannon v. N. W. Mut. L. Ins. Co.* 29 Hun, 470; *Bloomington v. Lisberger*, 24 Hun, 355.

<sup>2</sup> *Lamb v. Bowser*, 7 Biss. 315-372; *Hermano v. Mildred*, 9 Q. B. 530; *Northampton M. L. S. Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Wright v. Sun Mut. Ins. Co.*, 6 Am. L. Reg. 485.

<sup>3</sup> *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273; *Continental L. Ins. Co. v. Webb*, 54 Ala. 688.

<sup>4</sup> *Northwestern M. L. Ins. Co. v. Elliott*, 7 Sawy. 17; 5 Fed. Rep. 225.

void there, it is valid or void everywhere. The few exceptions to this rule need not be mentioned in the application of it to this case.<sup>1</sup> Where, then, was this contract made? in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made the transaction a contract, binding upon the parties? The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And until it was binding upon the company, it was not binding on the applicant—in short, it was not yet a contract, but only a proposition.<sup>2</sup> The case of *Hyde v. Goodnow*,<sup>3</sup> cited by counsel for plaintiff, is not contrary to this conclusion. There the assured, living in Ohio, applied to a company in New York, through its local agent and surveyor, for insurance, sending with his application a premium note and the report of the surveyor thereon. The company accepted the application in New York, and mailed the policy direct to the applicant in Ohio, which in accordance with its by-law, contained the stipulation that it should not be binding until the application and premium note were deposited in the office of the company and approved by its directors. The contract, if made in Ohio, was illegal and void, because the company was not authorized to transact business there, but in a suit upon the premium note against the maker in New York, the court held that the contract was made in the latter State, and

<sup>1</sup> *Cox v. United States*, 6 Pet. 203; *Hyde v. Goodnow*, 3 N. Y. 269; *In re Clifford*, 2 Sawy. 428.

<sup>2</sup> *Pomeroy v. Mahattan L. Ins. Co.*, 40 Ill. 400; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109; *Wood F. Ins.* 189, n. 2; *Hardie v. St. Louis M. L. Ins. Co.*, 26 La. Ann. 242; *St. Louis M. L. Ins. Co. v. Kennedy*, 6 Bush, 450.

<sup>3</sup> 3 N. Y. 269.

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therefore valid, because, when the application was approved and the policy deposited in the mail, at New York, addressed to the defendant, the contract was then and thereby executed, and became binding on the parties thereto. An offer by mail to insure certain property and an acceptance by letter of the proposition, constitute a valid contract at and from the place and date of mailing such letter of acceptance.”<sup>1</sup>

§ 176. **Stipulation in Policy cannot avoid Operation of Statute.**—A corporation cannot by stipulations in its contract avoid or withdraw the operation of a statute of the place in which it does business. The rule and the facts to which it was applied are sufficiently stated by Judge Treat thus:<sup>2</sup> “Inasmuch as the policy sued on declared that it rests on the basis of answers made in the application, and that said policy was to be issued at the home office in New York on return thereto of the application, can the plaintiff avail himself of the force of the Missouri statute? The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the *letter* of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the State on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policy withdraw themselves from

<sup>1</sup> *Tayloe v. The Merchants F. Ins. Co.*, 9 How. 398. See also *Northampton Mut., etc., Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Continental L. I. Ins. Co. v. Webb*, 54 Ala. 688; *Smith v. Mutual Life Ins. Co.*, 5 Fed. Rep. 582; *Cromwell v. Royal Can. Ins. Co.*, 49 Md. 366; *Todd v. State Ins. Co.*, 11 Phila. 355.

<sup>2</sup> *Fletcher v. New York Life Ins. Co.*, 4 McCrary, 440; 13 Fed. Rep. 528.

the limitations of the Missouri statutes while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the State and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business within this State under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws, by the force of which it could alone do business within the State. To hold otherwise would be subversive of the right of a State to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the State jurisdiction. Each State can decide for itself whether a foreign corporation shall be recognized by it, and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the State creating it, and when it undertakes business beyond it does so only by comity. The defendant corporation having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute."<sup>1</sup> And a provision in a policy, issued in New York, but to be delivered in Missouri on payment of the premium there, requiring payment of three full annual premiums before the assured was entitled to temporary insurance is void if the statutes of Missouri provide that payment of two full annual premiums shall entitle the insured to such temporary insurance.<sup>2</sup>

§ 177. **Interpretation of Contracts of Insurance.**—Contracts of insurance have no particular sanctity over

<sup>1</sup> *White v. Connecticut Life Ins. Co.*, 4 Dill. 177; *Lowell v. Alliance Life Ins. Co.*, 3 Cent. L. J. 699.

<sup>2</sup> *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273.

other kinds of agreements, and the same rules of interpretation apply to all alike.<sup>1</sup> It was said in the early days that insurance contracts required the utmost good faith, because the facts were of necessity less known to one party than to the other, but this may be said of many different agreements, and modern decisions have inclined to greater liberality to the insured than to the insurer. As in the case of statutes the principal consideration is the intent, so in contracts of insurance the courts endeavor to ascertain what the parties intended by their contract,<sup>2</sup> and this is, first of all, to be sought by taking the words in which the agreement is expressed in their ordinary meaning, only resorting to other rules where there is ambiguity or doubt. The construction must be reasonable; as was said by Judge Nelson, in a case<sup>3</sup> where the contract provided that in case of a loss that a certificate should be given by the nearest magistrate and the contention of the company was that this had not been done: "This clause of the contract is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition. Beyond this one would be sacrificing substance to form—following words rather than ideas." To the same purpose the Supreme Court of Illinois has said: <sup>4</sup> "The question here, as in other cases of contract, is to arrive at the intention of the parties, and we are not authorized, in striving to do so, to construe words otherwise than as conveying their plain, natural and obvious meaning, unless, from a consideration of the entire evi-

<sup>1</sup> Supreme Commandery, etc., *v.* Ainsworth, 71 Ala. 448.

<sup>2</sup> Goodrich *v.* Treat, 3 Colo. 408; Foot *v.* Ætna Life Ins. Co., 61 N. Y. 571.

<sup>3</sup> Turley *v.* North Am. F. Ins. Co., 25 Wend. 377.

<sup>4</sup> Royal Templars, etc., *v.* Curd, 111 Ill. 288.



dence, it shall appear, this could not have been intended.”<sup>1</sup> The Supreme Court of Missouri has also said:<sup>2</sup> “The construction of the language of the policy is to be determined, as in other contracts, by usage and common acceptation; and the stipulations, though being of a character of warranties and conditions, are to be reasonably construed with reference to the whole subject-matter, and not captiously or literally.”<sup>3</sup> The modern decisions simply reiterate in substance the words of Lord Ellenborough:<sup>4</sup> “In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases; it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance, and other instruments in this respect, is, that the greater part of the printed language of them, being invariable and uniform, has acquired from use and practice a

<sup>1</sup> Peoria, etc., Ins. Co. v. Whitehill, 25 Ill. 466.

<sup>2</sup> Tesson v. Atlantic M. Ins. Co., 40 Mo. 33; 93 Am. Dec. 296.

<sup>3</sup> St. John v. American Mut. Life Ins. Co., 13 N. Y. 31; 64 Am. Dec. 529; Insurance Co. v. Slaughter, 12 Wall. 404; Mark v. Aetna Ins. Co., 29 Ind. 390; May on Ins., § 172.

<sup>4</sup> Robertson v. French, 4 East, 135.

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known and definite meaning, and that the words super-added in writing (subject, indeed, always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.”<sup>1</sup>

§ 178. **Interpretation of Contracts of Benefit Societies.** — In the case of benefit societies the contract must be construed liberally in order to carry out the benevolent object of the creation of these organizations. It is to be construed with reference to the statutes of the place of its organization, and it will never be presumed that the society intended to violate the law; but, whenever a by-law seems to go beyond the statute restrictions, such meaning will be given to it, if possible, as will make the two consistent, and generally the courts have manifested a liberality to these institutions and have looked upon them with favor.<sup>2</sup>

§ 179. **Construction when Language is Ambiguous.** — It is also a rule of construction that where the language used is ambiguous or inaccurate and susceptible of two interpretations, it shall be construed most favorably to the

<sup>1</sup> Coit v. Commercial Ins. Co., 7 Johns. 385.

<sup>2</sup> Elsey v. Odd-fellows, etc., Assn., 142 Mass. 224; American Legion of Honor v. Perry, 140 Mass. 580; Ballou v. Gile, 50 Wis. 614; Supreme Lodge, etc., v. Schmidt, 98 Ind. 374; Erdmann v. Ins. Co., 44 Wis. 376; Covenant Mut. B. A. v. Sears, 114 Ill. 108; Maneely v. Knights of Birmingham (Pa.), March, 1887; 9 Atl. Rep. 41; 7 Cent. Rep. 633; Splawn v. Chew, 60 Tex. 532; *post*, § 247.

promisee in the obligation. The Court of Appeals of New York has stated this general principle very clearly in a case where the insurance company contended, that by one partner in a firm selling out to the others the condition in the policy, that if the property assured should be sold or conveyed, then the policy should be void, had happened. In that case the court, in deciding in favor of the assured, held as follows: <sup>1</sup> “The design of the provision was, not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured. If the words were taken literally, a renewal of the policy would be required at the close of each day’s sales. Indeterminate forms of expression, in such a case, are to be understood in a sense subservient to the general purposes of the contract. It is true that the language of the proviso against sales, was not guarded by a special exclusion of changes of interest as between the assured, or of the sales of merchandise in the usual course of their business; but this was for the obvious reason that there was nothing in the tenor of the instrument to denote, that the application of the clause to such a case was within the contemplation of the underwriters. ‘The matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense; and therefore the generality of the words used shall be restrained by the particular occasion.’” <sup>2</sup> Thus, in an action on a life policy, containing a proviso that it should be void ‘in case the assured should die by his own hands;’ it was held by this court, that though in terms it embraced all cases of suicide, it could not properly be applied to self-destruction by a lunatic, as there was no reason to suppose that such a case was within the purpose of the clause or the contemplation of the parties. <sup>3</sup> ‘All words,’

<sup>1</sup> Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 412.

<sup>2</sup> Powell on Cont. 389; Van Hagen v. Van Rensselaer, 18 Johns. 423..

<sup>3</sup> Breasted v. Farmers’ Loan and Trust Co., 4 Seld. 299.

says Lord Bacon, ‘whether they be in deeds or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and the person.’<sup>1</sup> Reading the proviso as it was read by the parties, it is easy to discern the purpose of its insertion. It was to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others, whom they might not be equally willing to trust. Words should not be taken in their broadest import, when they are equally appropriate in a sense limited to the object the parties had in view. The terms of the policy were not such as would naturally suggest even a query in the minds of the assured, whether a transfer of interest as between themselves would work a forfeiture of the insurance, and relieve the company from its promise to indemnify both — the buyer as well as the seller — the premium being paid in advance, and the risk remaining unchanged. One of two joint payees of a non-negotiable note would hardly be more surprised to be met with a claim, that by buying the interest of his associate he had extinguished the obligation of the maker to both. It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee.<sup>2</sup> It is also a familiar rule of law, that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee.<sup>3</sup> This rule has been very uniformly applied to conditions and provisos in policies of insurance, on the ground, that though

<sup>1</sup> Bacon’s Law Maxims, Reg. 10.

<sup>2</sup> Potter v. Ontario Ins. Co., 5 Hill, 149; Barlow v. Scott, 24 N. Y. 40.

<sup>3</sup> Co. Litt. 183; Bacon’s Law Maxims, Reg. 3; Doe v. Dixon, 9 East, 16; Marvin v. Stone, 2 Cow. 806.

they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation.<sup>1</sup> In the case first cited<sup>2</sup> the action was for a marine loss, and one of the issues was, whether a recovery was barred by the entry of a ship into a blockaded port, such ports being excepted by the policy. The court held, that though the case was within the terms, it was not within the intent of the exception; and that as the risk contemplated in the clause was merely that of capture, the rule of liberal construction must be applied in favor of the promisee. The reason assigned by Chief Justice Marshall was that 'the words are the words of the insurer, not of the insured; and they take a particular risk out of the policy, which but for the exception would be comprehended in the contract.'"<sup>3</sup> Contracts of insurance, because they have indemnity for their object, are to be construed liberally so as to give them effect if possible.<sup>4</sup> If the policy contains two provisions, one favorable to the assured and one unfavorable, they being inconsistent and contradictory, that provision most favorable to the assured will be accepted and the other disregarded.<sup>5</sup> Only a stern legal necessity will induce such a construction as will nullify the contract.<sup>6</sup> The rule that an insurance

<sup>1</sup> *Yeaton v. Fry*, 5 Cranch, 341; *Palmer v. Warren Ins. Co.*, 1 Story, 364; *Pelly v. Royal Exchange Ins. Co.*, 1 Bur. 349.

<sup>2</sup> *Yeaton v. Fry*, 5 Cranch, 341.

<sup>3</sup> *Merrick v. Germania Fire Ins. Co.*, 54 Pa. St. 277; *Atlantic Ins. Co. v. Manning*, 3 Colo. 226; *Allen v. St. Louis, etc., Ins. Co.*, 85 N. Y. 473; *Piedmont & Arlington, etc., Ins. Co. v. Young*, 58 Ala. 476; *Metropolitan L. Ins. Co. v. Drach*, 101 Pa. St. 278; *Symonds v. Northwestern M. L. Ins. Co.*, 23 Minn. 491; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644.

<sup>4</sup> *State Ins. Co. v. Hughes*, 10 Lea, 461; *Brink v. Merchants, etc., Ins. Co.*, 49 Vt. 442; *Miller v. Insurance Co.*, 12 W. Va. 116.

<sup>5</sup> *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192; *Moulou v. American Life Ins. Co.*, 111 U. S. 335; *National Bank v. Insurance Co.*, 95 U. S. 673; *Teutonia F. Ins. Co. v. Mund*, 102 Pa. St. 89.

<sup>6</sup> *Carson v. Jersey City Ins. Co.*, 14 Vroom (43 N. J. L.), 300; 39 Am. Rep. 584; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Burkhard v. Travelers Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205.

contract shall be construed most strongly against the insurer, can only be resorted to when, after using such helps as are proper to arrive at the intent of the parties, some of the language used, or some phrase inserted in the policy, is of doubtful import, in which case the rule should be applied because the insurer wrote the contract.<sup>1</sup>

§ 180. **Contracts of Mutual and Stock Companies Construed Alike.** — No distinction is made, as regards construction, between the policies of mutual and those of other companies. The fact that the policy is one of a mutual company cannot modify the construction which is to be given to the terms of the contract. While the relations of the parties are always to be considered in seeking the true interpretation of their language, their words, used for a definite purpose and applied to a transaction of well understood character, must be held to convey the meaning and force which is ordinarily attached to them. There is no reason why a contract of insurance between a mutual company and its members should be given any significance different from what would be the fair construction of a similar contract entered into between any parties.<sup>2</sup> The stipulations of a written contract are no less binding in a contract between a corporation and one of its members than in a contract made with a stranger, in each case the rules of construction are the same.<sup>3</sup> On this point it has been said: <sup>4</sup> “ These benevolent associations or fraternities, not more than other parties to contracts, cannot be allowed to construe the words they use in making agreements otherwise than according to their plain and unambiguous meaning, in the English language they employ, whether of the words of the contract itself or of the rules and regulations

<sup>1</sup> *Foot v. Aetna Life Ins. Co.*, 61 N. Y. 575; *post*, § 468.

<sup>2</sup> *Cluff v. Mutual Benefit Life Ins. Co.*, 99 Mass. 325.

<sup>3</sup> *Willcuts v. Northwestern Mutual Life Ins. Co.*, 81 Ind. 300.

<sup>4</sup> *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 124.

which become, by the principle they insist on, embodied in the contract as a part of it. They cannot be permitted to interpret the contract as they please and become their own judges of what they mean by the use of the words employed that have either a technical or well defined signification, known of all men who use the language. Legislatures and parliaments cannot do that, and even they are bound by the common meaning of the words they use in their statutes which become part of a contract.”

§ 181. **Other Papers Part of Contract, when.** — It is not necessary that a written contract be wholly embraced in one document. Other papers may become part of such contracts by either being incorporated or being properly referred to therein. The question is one of intent and the intention is to be found in the contract, and a writing intended to be a part thereof may be incorporated in it by apt reference as well as by extended recital.<sup>1</sup> The principle becomes chiefly important where application has been made in writing for insurance, and the inquiry is whether or not the application, by the terms of the policy, has been made part thereof so that its statements have become warranties. The subject will be further discussed when we come to consider the matters of warranty and representation,<sup>2</sup> and at present it is enough to refer to it in a general way. It is not every reference in a contract to another writing that will make the latter a part of the contract; there must sufficiently appear the intention to unite the two writings and merge them into one by reference or recital. Thus, where an application, by a member of a benefit society for a certificate in the nature of a life insurance policy contained this clause, “I further agree, that should I, at any time,

<sup>1</sup> *Sheldon v. Hartford Fire Ins. Co.*, 22 Conn. 235; 58 Am. Dec. 420; *Anderson v. Fitzgerald*, 4 H. of L. Cas. 474; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 303; *Robertson v. French*, 4 East, 130.

<sup>2</sup> *Post*, § 194, *et seq.*

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violate my pledge of total abstinence, or be suspended or expelled for a violation of any of the laws of the order, or for non-payment of dues, etc., then all rights which either myself, the person or persons named in the certificate, my heirs, etc., may have upon the beneficiary fund of the order, shall be forfeited," it was held that the application was a part of the contract of insurance, and obligatory upon the beneficiary named in the certificate, to whom payment was promised on the death of the member, and that the language was in the alternative, making either or any one of the causes named, a ground of forfeiture of all right of recovery upon the certificate.<sup>1</sup> So, where a policy of life insurance contained a stipulation that it should be void if a certain declaration made in the application by or for the person whose life was insured, "and upon the faith of which this agreement was made, shall be found in any respect untrue," it was held that such declaration constituted a portion of the contract, and was made material by the contract, and the only question of fact respecting the same was whether it was true or false.<sup>2</sup> The Supreme Court of Iowa, in a case where the policy stated that it was issued and accepted in consideration of the agreements made in the application of the assured, and it was provided in the application that a failure to pay the annual dues should avoid the policy, said: <sup>3</sup> "The policy, as we have seen, was issued in consideration of the statements made in the application, and the application states that it forms the basis and consideration upon which the policy was issued, and that a neglect to pay the annual dues shall render the policy void. We think these two papers should be read together, in order to ascertain what the contract between the

<sup>1</sup> Supreme Council, etc., v. Curd, 111 Ill. 284.

<sup>2</sup> Day v. Mutual Benefit L. Ins. Co., 1 McArthur, 41; 29 Am. Rep. 565; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; Byers v. Insurance Co., 35 Ohio St. 606; Jeffries v. Life Insurance Co., 22 Wall. 47.

<sup>3</sup> Mandego v. Centennial, etc., Assn. 64 Ia. 134.



parties is. The policy is based on the application. But for the latter the policy would never have been issued. \* \* \* As the application is a part of the policy, it makes no difference in what part of either paper the condition is found which renders the policy void. It may be found partly in one and partly in the other. The two papers, when read together form the contract. The rights of the parties in no other way can be ascertained.”<sup>1</sup>

§ 182. **The Same Subject: Further Illustrations.**—A paper drawn up in lead pencil, and containing statements made by the assured, and signed by him has been held to be a part of the policy if referred to therein by a number although it was addressed to another than the insuring company.<sup>2</sup> Words and figures in the margin of a policy denoting that part of the agreed premiums have been paid may be considered part of it.<sup>3</sup> So an *ad interim* receipt reciting that the insurance under it is subject to the condition of the company's policies makes the conditions part of the contract.<sup>4</sup> So, in a mutual company the premium note ordinarily forms a part of the contract,<sup>5</sup> but not so if the note is absolute on its face, only reciting that its consideration was a policy of insurance,<sup>6</sup> and it has been held that the application, policy and premium note are parts of the same transaction and should be construed together.<sup>7</sup> Indorsements on a policy are generally to be construed in connection with its provisions,<sup>8</sup> and where the body of the policy

<sup>1</sup> Foot v. *Ætna Life Ins. Co.*, 61 N. Y. 575; *Chrisman v. State Ins. Co. (Or.)*, 18 Pac. Rep. 466.

<sup>2</sup> *City Ins. Co. v. Bricker*, 91 Pa. St. 488.

<sup>3</sup> *Pierce v. Charter Oak Life Ins. Co.*, 138 Mass. 151.

<sup>4</sup> *Goodwin v. Ins. Co.*, 16 Low. Can. Jur. 298.

<sup>5</sup> *Schultz v. Hawkeye Ins. Co.*, 42 Ia. 239; *Murdock v. Chenango Ins. Co.*, 2 N. Y. 221.

<sup>6</sup> *American Ins. Co. v. Gallahan*, 75 Ind. 168.

<sup>7</sup> *American Ins. Co. v. Stoy*, 41 Mich. 385.

<sup>8</sup> *Alabama, etc., Ins. Co. v. Thomas*, 74 Ala. 578

refers to the annexed conditions, these, though printed on the back of the policy and unsigned, form a part of the contract,<sup>1</sup> but the reference may be such as not to make the indorsement a part of the policy.<sup>2</sup> It has been held also that where conditions are indorsed in small type upon the back of a policy they are not parts of it unless the attention of the insured is distinctly called to them at the time the contract is made.<sup>3</sup>

**§ 183. Reference in Policy to Other Papers must be Plain to make Them a Part of It.** — Where it is desired to make other papers, as in contracts of insurance the application, a part of the policy the reference thereto in the latter must be plain. Where there are no words of reference to the application in the policy they form no part thereof. If the insurer wishes to make them so he must refer to them and cannot claim that by implication they are to be treated as a part thereof.<sup>4</sup> In the latter of the cases cited as supporting the foregoing proposition, the policy provided that an application or survey, if referred to therein, should be considered part of the agreement, but no other reference being made, the court held that the application was not to be regarded as embodied in the policy. So, where the policy contained no reference to the application, but the latter provided that it was part of the contract, it was held that this stipulation did not make it so.<sup>5</sup> In the same way, if an indorsement or direction on the back of a policy is not referred to in the policy or by-laws of the company, there is nothing to show that the parties meant the indorsement

<sup>1</sup> *Kensington National Bank v. Yerkes*, 86 Pa. St. 227

<sup>2</sup> *Mullaney v. National, etc., Ins. Co.*, 118 Mass. 393.

<sup>3</sup> *Bassell v. American F. Ins. Co.*, 2 Hughes, 531.

<sup>4</sup> *Merchants Ins. Co. v. Dwyer*, 1 Tex. Unrep. Cas. 445; *Moore v. State Ins. Co. (Ia.)*, 34 N. W. Rep. 183; *Weed v. Schenectady Ins. Co.*, 7 Lans. 452.

<sup>5</sup> *Brogan v. Manufacturers', etc., Ins. Co.*, 29 Up. Can. C. P. 414.

to be part of the contract and it will not be so regarded.<sup>1</sup> It has been held, where an application for a policy of life insurance contained an agreement that the answers and statements should "be the basis and form part of the contract or policy, and if the same be not in all respects true and correctly stated, the said policy shall be void according to the terms thereof," and the policy declared that the insurance was "in consideration of the representations," etc., and that fraud and intentional misrepresentations should vitiate the policy, but did not otherwise refer to the application, that the agreement and statements in the application did not become a part of the policy.<sup>2</sup> In that case the court said: "To hold that the statements of the proposal and application, notwithstanding the agreement therein above quoted, are not incorporated into the policy, and, therefore, are not warranties or conditions of insurance, is but to apply the rule that where the parties to an agreement have reduced their contract to writing, that writing, at law, determines what the contract is, and evidence cannot be received to contradict, add to, subtract from or vary the terms of the writing. The policy in this case is the agreement for insurance, and it must be held to contain the agreement and all the agreement of the parties to it. Though the proposal and application contain an agreement on the part of the insured, that the answers to the questions annexed to them and the accompanying statements, together with the statements made to the examining physician, shall be the basis and form part of the contract or policy, between the insured and the company, yet the policy does not, directly or indirectly, so declare, and it will be

<sup>1</sup> *Planters', etc., Ins. Co. v. Rowland*, 66 Md. 240; *Stone v. U. S. Casualty Co.*, 34 N. J. L. 371; *Kingsley v. New Eng., etc., Ins. Co.*, 8 Cush. 393; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416; *Farmers', etc., Ins. Co. v. Snyder*, 16 Wend. 481.

<sup>2</sup> *American Popular, etc., Ins. Co. v. Day*, 39 N. J. L. 89; 23 Am. Rep. 198.

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assumed that all previous negotiations have been superseded and that the policy alone expresses the contract of the parties.”<sup>1</sup>

**§ 184. What Constitutes the Contract of Insurance.** — The conclusion from the preceding statements is that the policy of insurance, after it is issued, together with all other writings aptly referred to therein, constitutes the contract of the parties; or in the case of benefit societies the certificate, in connection with the laws of the order, contains such contract. It follows that all previous verbal stipulations not contained in the policy or certificate, nor referred to therein, are not to be considered in anyway as modifying such a written contract.<sup>2</sup> And parol agreements as to future conduct, or subsequent promises resting on a new consideration, cannot constitute a part of the contract.<sup>3</sup>

**§ 185. After Enacted Laws of Benefit Society Generally Bind its Members.** — It is often the case that after a person becomes a member of a benefit society the laws are changed and it then becomes a question to what extent the original contract is thereby affected. As the laws of every benefit society enter into the contract between it and its members, whether it be so stipulated or not in the certificate,<sup>4</sup> it follows that, when changes are made in the laws in the prescribed manner, the alterations are equally binding upon all the members. The rule must be understood with the proviso or exception, which applies to all legislation alike, that laws cannot be retroactive or be so construed as to cut

<sup>1</sup> *Pawson v. Watson*, 1 Cowp. 785; *Insurance Co. v. Mowry*, 96 U. S. 544.

<sup>2</sup> *Insurance Co. v. Mowry*, 96 U. S. 544.

<sup>3</sup> *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea, 488; *Hearn v. Equitable, etc., Ins. Co.*, 3 Cliff. 328; *post*, §§ 221, 355, 428, 464.

<sup>4</sup> *Ante*, § 161.

off rights already fixed. This rule may be also further modified by the language of the contract in the particular case.

§ 186. **An Extreme Case.**—One of the earliest cases was decided by the Supreme Court of Vermont where Judge Redfield said: <sup>1</sup> “ At the time the husband became a member of the society in 1862, the by-laws provided that each member paying the regular assessment, should ‘ be entitled to twenty-five cents per day during their sickness; ’ and ‘ to the widow of each member deceased, so long as she shall remain a widow, and shall enjoy a good reputation, twenty-five cents per day.’ It was further provided that, ‘ so long as there shall be twenty dollars in the treasury, the society cannot reduce its aid to the sick.’ There is, also, a special provision for the manner of altering or changing the by-laws; and there is, also, a provision in the charter that the society may alter or change its by-laws. In August, 1869, the defendant corporation adopted a set of by-laws which provided that such widows shall receive twenty-five cents per day ‘ until she had received \$200.’ The plaintiff has received \$200, in accordance with the latter by-law of the society. It is insisted that a right had become vested in the plaintiff (her husband died Jan. 5, 1869), to have and receive of the defendant twenty-five cents per day during her widowhood; and that it was not competent for the defendant to deny or diminish it. The means of making these contributions to the sick, and the widows of deceased members, were derived solely from voluntary assessments upon the members of the society and must be graduated by such assessments. And experience might prove that, without assessments greater than the members could bear, there must be a limitation to the stipend to widows. Prevailing sickness among the members may have so exhausted the means of the society, that the provision for widows, must,

<sup>1</sup> *Figure v. Society St. Joseph*, 46 Vt. 369.

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necessarily, be modified, or it could not discharge the duties for which it was formed. It must be incident to the very nature and purpose of such an association, that it should have power to modify and change its by-laws so as to graduate its charities as experience and necessity may require. It cannot, indeed, pervert its contributions to subserve other ends and purposes; but the society may regulate the manner in which they shall carry out the purposes for which they associated. They provided that care for the sick should not be suspended or abridged while \$20 remained in the treasury; thus, by necessary implication, conceding that other provisions might be made. Some sweeping disease might so exhaust the resources of the society, that stipends to widows in health must necessarily be suspended or much abridged; and this could be regulated only by practice and experience. The regulation limiting the widow's share in this charity to \$200, was made by a general law, and applicable to all; and there is no suggestion of fraud, or that the regulation was not wise and salutary. We think that the society were competent to make this by-law; and, having fully performed the duty imposed the plaintiff cannot recover. But in this case there was an express provision in the constitution of this society, that the by-laws might be changed, and the manner of doing it was specifically pointed out; so that the husband voluntarily became party in an association, and contributed his money with full knowledge of all the provisions in the articles of association, and fully assented to the same. There is no good reason, therefore, for claiming that the widow had a vested right which the society could not modify."

§ 187. **The Better View : After Enacted Laws must not Affect Vested Rights.** — In a somewhat similar case in New York,<sup>1</sup> an action was brought against a lodge of Odd-fel-

<sup>1</sup> *Poultney v. Bachmann*, 62 How. Pr. 466.

lows, by one of its members, to recover sick benefits to which he claimed to be entitled. The plaintiff had joined the lodge years before, when its by-laws provided that in case of sickness a member should receive a specified sum weekly during his sickness or disability. Another section empowered the lodge to alter or amend the by-laws whenever deemed expedient. After the plaintiff had been taken sick, and while he was in receipt of the weekly sum allowed him, a by-law was passed reducing the amount of the payments from four dollars to one dollar a week. The court held that the right of the lodge to change its by-laws was undoubted, but that the powers reserved must be exercised in a reasonable manner, and that it was an unreasonable interpretation to place upon the contract to hold, that after the contingency provided for had occurred so that the right of the member had become vested, that the lodge could repudiate its obligation either in whole or in part. In this case the court followed a previous decision,<sup>1</sup> where the articles of association provided that upon the death of one of its members, his widow should be entitled to receive four dollars monthly during widowhood. After the death of the plaintiff's husband, who was a member of the society, the article was amended so as to entitle the widows to receive one dollar from each member of the society. Under these facts the court held that the new article was not retroactive and did not affect plaintiff's rights. In a somewhat similar case in Ohio,<sup>2</sup> the facts were that the defendant was a benevolent society of which the plaintiff's insane husband was a member, she being his guardian. By one of its by-laws, sick members were entitled to receive three dollars per week while unable to pursue their usual business. In these by-laws the usual right to amend was reserved. Plaintiff's husband had been a member for many years, and

<sup>1</sup> *Gundlach v. Germania, etc., Assn.*, 4 Hun, 341.

<sup>2</sup> *Pellazzino v. German, etc., Society*, 16 Cin. W. L. B. 27.

in October, 1881, became unable to work. In October, 1882, the original by-laws were amended limiting the right to benefits to thirteen weeks in the year. The wife sued for benefits under the old law, her husband never having agreed to the change. The superior court, in upholding the claim said: "It is true, as argued by counsel for defendant, and held by the court in Vermont,<sup>1</sup> that by the terms of the agreement between the members, which constitutes the society, and of that between the society and each member, which amounts to a policy of insurance, a right to amend was reserved. But it was a right to amend the by-laws, not to repudiate a debt. A by-law provides what the rights of members shall be in certain events if they continue to pay their dues until such events happen; this, of course, by virtue of the reserved right, may be amended or repealed. But when the event happens, what was a contract depending upon a contingency, becomes in law a debt. The right to modify a contract does not include the right to repudiate a debt, any more than the reserved right of a legislature to repeal the charter of a corporation gives it the right to confiscate its property."<sup>2</sup>

§ 188. **The Subject Discussed by the Supreme Court of Alabama.** — The subject was fully discussed by the Supreme Court of Alabama<sup>3</sup> where a benefit society had issued a certificate, promising to pay a certain benefit in event of the death of the member, and containing a condition that it should be "subject to the laws of the order now in force or which may hereafter be enacted by the supreme commandery." After the issue of the certificate

<sup>1</sup> *Figure v. Society St. Joseph*, 46 Vt. 362, *supra*.

<sup>2</sup> *St. Patrick's, etc., Society v. McVey*, 92 Pa. St. 510; *Byrne v. Casey* (Tex.), 8 S. W. Rep. 38; *McCabe v. Father Matthew, etc., Soc.*, 24 Hun, 149; *Morrison v. Wisconsin, etc., Ins. Co.*, 59 Wis. 162; *Stewart v. Lee Mut., etc., Assn. (Miss.)*, 1 South. Rep. 743; *ante*, § 92.

<sup>3</sup> *Supreme Commandery, etc., v. Ainsworth*, 71 Ala. 449.



the supreme commandery enacted a by-law providing that any member who should "take his own life, sane or insane," should thereby forfeit all rights under the certificate and it should become void. The member did take his own life and the plea of forfeiture under the by-law was set up by the society, in an action brought by the beneficiary named in the certificate. In deciding the point the court said: "With a view of excepting from the operation of the policy any intended self-destruction, whether the assured is sane or insane at the time of its commission, insurance companies are in the habit of inserting in policies a provision, the equivalent of that expressed in the law of the association now under consideration. The exception as to the insane has been supported, and it is said to be as much the right of the insurer to stipulate for exemption from liability in the event of intentional self-destruction by the insane, as to stipulate for an exemption from liability because the hazard of loss is increased from the fact of the assured engaging in occupations perilous to life, or taking up residence in an unhealthy climate.<sup>1</sup> In this respect the law adds a new term to the contract, relieves the association from an existing liability, and lessens the value and security of the certificate to the assured. It is not claimed that there is an inherent power in the association, by the adoption of a by-law, to work such radical changes in its existing contracts. The power is derived from, and depends upon the stipulations of the contract at the time it was made. The stipulations are expressed in varying terms and several of them import no more than would be implied—the observance by the insured of the requirements of the association, such requirements as were reasonable, and intended to promote the harmony of the association, and the purposes and objects for which it was formed. They import also obedience to the by-laws, so far as reasonable,

<sup>1</sup> Bigelow v. Berkshire Life Ins. Co., 93 U. S. 234.

consistent with the charter and law of the land. We do not construe them as reserving, or as intended to reserve, to the association the power to change or avoid its contracts, to lessen its responsibilities, or to divest its members of rights. This is not the proper office of a by-law; and from the general expressions to which we are referring, it cannot be fairly presumed or intended that it was contemplated to affect the members by other than such by-laws, as it was within the competency of the association to enact. But in addition to these, the averment of the plea is, that the certificate was accepted by the assured 'subject to the laws of the order now in force, or which may be hereafter enacted by the supreme commandery.' These are words of large signification, and clearly express that the assured consented that the contract should be subject to future, as well as existing by-laws. Parties may contract in reference to laws of future enactment — may agree to be bound and affected by them, as they would be bound and affected if such laws were existing. They may consent that such laws may enter into and form parts of their contracts, modifying or varying them. It is their voluntary agreement which relieves the application of such laws to their contracts and transactions from all imputations of injustice. \* \* \* The members of associations, created for purposes and objects like those which seem to be the purposes and objects of this organization, may very properly be required to assent that the contract conferring upon them rights shall be subject to, and depend upon the future, as well as the existing laws adopted by the governing power. The fundamental principle of such organizations is the mutuality of duty and equality of rights of the membership, without regard to time of admission. This cannot well be preserved, if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and experience will develop a necessity

for changes in the laws, and if the consent was not required, there would be a class of members bound by the changed laws, and a class exempt from their operation. The case before us is an illustration. Of the legality and propriety of the provision relieving the association from liability, if a member while insane deprived himself of life, there is no good reason to question. If no other reason could be given, that it relieves the association from litigating with the representatives of a deceased member the distressing question of his sanity, would be sufficient. If the law was applied only to certificates issued subsequent to its enactment, there would be a class of members having certificates of greater value than the certificates held by another class; yet each class would be subject to the same assessments and the same duties. There is but little room, if any, for the apprehension, that advantage will be taken by the governing body of the assent of the members to be bound and affected by subsequent laws, to impose upon him unjust burdens, or to vary the contract, save so far as an alteration or modification of it may be promotive of the general good. Subsequent or existing by-laws are valid only when consistent with the charter and confined to the nature and objects of the association. While a subsequent law, because of the assent of the member, may add new terms or conditions to a certificate, terms or conditions reasonably calculated to promote the general good of the membership, and may be valid and binding, it does not follow that a law operating a destruction of a certificate, or a deprivation of all rights under it, would be of any force.”<sup>1</sup>

## CHAPTER VI.

### APPLICATION, WARRANTY, REPRESENTATION AND CONCEALMENT.

- § 190. Insurance Contract Result of Proposal and Acceptance.
- 191. Difficulties in Construing Language of the Policy Referring to the Application.
- 192. Early Interpretation Contrasted with Modern Construction.
- 193. Statutes on the Subject.
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- 229. The Dwight Case.
- 230. Answers in Regard to Parents, Relatives, etc.
- 231. Habits: Use of Intoxicants: Liquor, Opium, etc.
- 232. Good Health.
- 233. Latent Diseases Unknown to Applicant.
- 234. Disease.
- 235. Accident or Serious Injury.

**§ 190. Insurance Contract Result of Proposal and Acceptance.** — The contract of insurance is the result of a proposal, or application, upon the part of the insured, and its acceptance by the insurer. Whether life insurance be effected with stock or mutual companies, or through membership in benefit societies, the process is much the same. There is first the proposal, or application, and then the acceptance. When accepted the application is followed by the issuance of the policy, or, in the case of benefit societies, the reception into membership, after which the certificate is furnished. The application is usually composed of several parts: there are the answers by the applicant to certain questions relating to age, family history, etc.; then is the certificate of the examining physician as to the results of the physical examination of the applicant, and lastly the certificate of a friend of the insured who occupies the position of a referee. From this proposal or application, the insurer determines the value of the risk and whether or not he will accept it.

**§ 191. Difficulties in Construing Language of the Policy Referring to the Application.** — The policy, issued

upon acceptance of this proposal, generally refers in some way to the application. It is in construing the language used in such reference that some of the greatest difficulties have been experienced by the courts. The effort of the companies has been to incorporate the application in the contract and have the insured warrant the truth of all his statements. When these statements were true no differences could well arise, but when the answers of the applicant to questions in the application were untrue, or equivocal, or partial, the only escape from loss of the insurance was to have the language of the policy so construed that a warranty of the statements of the application would not be held to exist. In the cases, therefore, the controversy has often been over this reference in the policy to the application, and whether the statements in the latter were warranties, which must be literally true, or representations which must be substantially true.

§ 192. **Early Interpretation Contrasted with Modern Construction.**—In no branch of the law have the decisions been more numerous or conflicting than in cases relating to applications for insurance, and it is difficult, if not impossible, to lay down any general rules which will apply in all cases. Says a standard writer on this subject:<sup>1</sup> “The cases would have presented fewer difficulties of construction if the early jurisprudence had been less open to the admission of forfeitures of the policy, and more easily satisfied with a compliance with written stipulations substantially equivalent to a literal one, when such construction was not inconsistent with the express provisions of the contract. The recent jurisprudence tends to greater liberality of construction in favor of maintaining the contract. Such a rule may as well be applied to stipulations and recitals in the policy as to representations preliminary and

<sup>1</sup> Phillips on Ins., § 638.

collateral to it; and it is more equitable after the policy has gone into effect and the underwriter has a right to retain the premium, that the contract should be continued in force as long as its being maintained is consistent with its express provisions, and the underwriter is not thereby prejudiced.” The companies themselves forced the courts into this departure, because their policies were generally so intricate, in their wording, and their liability so hedged in and restricted by a multiplicity of covenants and conditions; the assured was tied down by so many warranties concerning immaterial matters, that in most cases, especially those involving fire insurance, the payment of the policy in event of loss was optional with the insurer, for an avenue of escape was generally open if he wished to avoid responsibility. Judicial sentiment, somewhat akin to popular sentiment, began to set in against this perversion of justice, and the absolute necessity for different reasoning appeared, for it was seen that it was unjust to absolve the insurer by a rigid adherence to forms of words rather than the intent of the parties, when the assured had been persuaded into a contract the terms of which he generally could not understand, and where, after he had paid in good faith the premium asked, he discovered too late that he had stipulated away any probability of getting his insurance if a loss occurred. The courts, therefore, began to condemn this scrupulously technical construction and to seek to avoid it. In one of the first cases, where this necessity for change was referred to, the Supreme Court of Iowa said: <sup>1</sup> “The business of insurance is rapidly increasing in magnitude and importance, and it is as essential to the companies themselves as to the assured that the rules of law declared applicable to them should be based upon just and equitable principles, and administered in a manner in harmony with the doctrines of an enlightened jurisprudence. It is quite

<sup>1</sup> *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia. 226; 7 Am. Rep. 122.

time that the technical constructions which have pertained with reference to contracts of this kind, blocking the pathway to justice, and leading to decisions opposed to the general sense of mankind, should be abandoned, and that these corporations, grown opulent from the scanty savings of the indigent, should be held to the same measure of responsibility as is exacted of individuals." About the same time the Supreme Court of the United States practically adopted the same doctrine,<sup>1</sup> and this doctrine, which had even earlier been favorably considered by a few courts, was still more generally accepted and approved, so that from reading some of the decisions in these cases, one would be justified in the conclusion that in many localities insurance companies, as a class, had made themselves disreputable in judicial eyes.<sup>2</sup>

§ 193. **Statutes on the Subject.** — These judicial declarations and the influence of public sentiment have led to the enactment, in some States, of statutes which provide that no misrepresentation or false statement in an application for life insurance shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the happening of the contingency or event on which the policy was to become due and payable, and that whether it so contributed in any case shall be a question for the jury.<sup>3</sup> The effect of these laws has been to benefit the assured and prevent technical forfeitures.<sup>4</sup>

<sup>1</sup> *Insurance Co. v. Wilkinson*, 13 Wall. 222.

<sup>2</sup> *American Central Ins. Co. v. Rothchild*, 82 Ill. 166; *New England, etc., Ins. Co. v. Schettler*, 38 Ill. 166; *Piedmont & Arlington L. Ins. Co. v. Young*, 58 Ala. 476; *Kausal v. Minnesota, etc., Assn.*, 31 Minn. 17; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Combs v. Hannibal, etc., Ins. Co.*, 43 Mo. 148; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Miller v. Mut. Ben. L. Ins. Co.*, 31 Ia. 226.

<sup>3</sup> Rev. Stat. Mo. 1879, § 5976. Similar provisions are found in some States relating to fire insurance. *Ante*, § 176.

<sup>4</sup> The state of things out of which this necessity for the protection of the assured, in cases of fire insurance especially, sprang, has been thus



§ 194. **Warranty Defined.** — The definition of warranty given by Angell,<sup>1</sup> and approved by the Court of Appeals of

graphically portrayed (*Delancey v. Rockingham, etc., Ins. Co.*, 52 N. H. 581): "Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at headquarters, with lucrative employment, — large compensation for light work, — not for the purpose of insuring property; for the payment of expenses, not of losses. Whether a so-called insurance company was originally started for the purpose of insuring an easily earned income to one or two individuals, or whether it came to that end after a time, the ultimate evil was the same. Names of men of high standing were necessary to represent directors. The directorship, like the rest of the institution and its operations, except the collection of premiums and the division of the same among the collectors, was nominal. Men of eminent respectability were induced to lend their names for the official benefit of a concern of which they knew and were expected to know nothing, but which was represented to them as highly advantageous to the public. There was no stock, no investment of capital, no individual liability, no official responsibility, — nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators. The principal act of precaution was, to guard the company against liability for losses. Forms of applications and policies of a most complicated and elaborate structure, were prepared and filled with covenants, exceptions, stipulations, provisos, rules, regulations and conditions rendering the policy void in a great number of contingencies. These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study; by men in general they were sure not to be studied at all. The study of them was rendered particularly unattractive, by a profuse intermixture of discourses on subjects in which a premium payer would have no interest. The compound, if read by him, would, unless he were an extraordinary man, be an inexplicable riddle, a mere flood of darkness and confusion. Some of the most material stipulations were concealed in a mass of rubbish, on the back side of the policy and the following page, where few would expect to find anything more than a dull appendix, and where scarcely any one would think of looking for information so important as that the company claimed a special exemption from the operation of the general law of the land relating to the only business in which the company professed to be engaged. As if it were feared that notwithstanding these discouraging circumstances, some extremely eccentric person might attempt to examine and understand the meaning of the involved and intricate net in which he was to be entangled, it was printed in such small type, and

<sup>1</sup> Angell on Ins., § 140.

New York,<sup>1</sup> is that it is "a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment

in lines so long and so crowded, that the perusal of it was made physically difficult, painful and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. There was ground for the premium payer to argue that the print alone was evidence, competent to be submitted to a jury, of a fraudulent plot. It was not a little remarkable, that a method of doing business not designed to impose upon, mislead and deceive him by hiding the truth, practically concealing and misrepresenting the facts, and depriving him of all knowledge of what he was concerned to know, should happen to be so admirably adapted to that purpose. As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity, which, if it had been exercised in any useful calling, would have merited the strongest commendation. Traveling agents were necessary to apprise the people of their opportunities, and induce them to act as policy holders and premium payers, under the name of 'the insured.' Such emissaries were sent out: 'The soliciting agents of insurance companies swarm through the country, plying the inexperienced and unwary, who are ignorant of the principles of insurance law, and unlearned in the distinctions that are drawn between legal and equitable estates.' (Combs v. Hannibal, etc., Ins. Co., 43 Mo. 152.) The agents made personal and ardent application to people to accept policies, and prevailed upon large numbers to sign papers (represented to be mere matters of form), falsifying an important fact by declaring that they made application for policies, reversing the first material step in the negotiation. An insurance company, by its agent, making assiduous application to an individual to make application to the company for a policy, was a sample of the crookedness characteristic of the whole business. When a premium payer met with a loss, and called for the payment promised in the policy, which he had accepted upon the most zealous solicitation, he was surprised to find that the voluminous, unread and unexplained papers had been so printed at headquarters, and so filled out by the agents of the company, as to show that he had applied for the policy. This, however, was the least of his surprises. He was informed that he had not only obtained the policy on his own application, but had obtained it by a series of representations (of which he had not the slightest conception), and had solemnly bound himself by a general assortment of covenants and warranties (of which he was unconscious), the number of which was equaled only by their variety, and the variety of which was equaled only by their supposed capacity to defeat every claim that could be made upon the company for the performance

<sup>1</sup> Ripley v. Aetna F. Ins. Co., 30 N. Y. 136.

of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written in the margin, or transversely, or on a subjoined paper referred to in the policy." Lord Mansfield has said,<sup>1</sup> that in order to make written instructions valid and binding as a warranty, they must undoubtedly be inserted in the policy. "It is," said Lord Ellenborough,<sup>2</sup> "a question of construction in every case, whether a policy is so worded as to make the accuracy of a *bona fide* statement a condition precedent, and the rules of construction are the same in policies as in other written contracts." And Bunyon adds:<sup>3</sup> "In order to make any statements binding as warranties, they must appear upon the face of the instrument itself by which the contract of insurance is effected; they must either be expressly set out or by inference incorporated in the policy. If they are not so they are not warranties, but representations."<sup>4</sup>

of its part of the contract. He was further informed that he had succeeded in his application by the falsehood and fraud of his representations, — the omission and misstatement of facts which he had expressly covenanted truthfully to disclose. Knowing well that the application had been made to him, and that he had been cajoled by the skillful arts of an importunate agent into the acceptance of the policy and the signing of some paper or other, with as little understanding of their effect as if they had been printed in an unknown and untranslated tongue, he might well be astonished at the inverted application, and the strange multitude of fatal representations and ruinous covenants. But when he had time to realize his situation, had heard the evidence of his having beset the invisible company, and obtained the policy by just such means as those by which he knew he had been induced to accept it, and listened to the proof of his obtaining it by treachery and guilt, in pursuance of a premeditated scheme of fraud, with intent to swindle the company in regard to a lien for assessments or some other matter of theoretical materiality, he was measurably prepared for the next regular charge of having burned his own property."

<sup>1</sup> *Pawson v. Watson*, 1 Cowp. 785.

<sup>2</sup> *Robertson v. French*, 4 East, 135.

<sup>3</sup> *Bunyon on Life Assurance*, 34.

<sup>4</sup> *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89; 23 Am. Rep.

The substance of the decisions relating to the subject of warranty in insurance contracts is that the truth of all statements warranted to be true is a condition precedent of the liability of the insurer; for, if the statements so warranted are untrue, there is no contract.

§ 195. **Difficulty of Determining what Amounts to Warranty.** — It is not always easy to determine what language in an insurance contract amounts to a warranty. As was said by the Supreme Court of Massachusetts:<sup>1</sup> “There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties and what representations. One general rule is, that a warranty must be embraced in the policy itself. If, by any words of reference, the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy. In a recent case; it was said that ‘the proposal or declaration for insurance, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a statement be intentional or not, the whole instrument depends.’”<sup>2</sup> But no rule is laid down in that case for determining how or in what mode such statements, contained in the application or answer to interrogatories, shall be embraced or incorporated into the policy so as to form part thereof. The difference is most essential, as indicated in the definition of a warranty in the case last cited, and as stated by the counsel for the defendants in the prayer for instruction. If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids

<sup>1</sup> *Daniels v. Hudson R. F. Ins. Co.*, 12 Cush. 416; 59 Am. Dec. 192.

<sup>2</sup> *Vose v. Eagle Life & Health Ins. Co.*, 6 Cush. 47.

the policy; if it be construed a representation, and is untrue, it does not avoid the contract if not willful or if not material. To illustrate this, the application in answer to an interrogatory is this: 'Ashes are taken up and removed in iron hods;' whereas it should turn out in evidence that ashes were taken up and removed in copper hods, — perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive, but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms. Hence it is, we suppose, that the leaning of all courts is to hold such a stipulation to be a representation rather than a warranty, in all cases where there is any room for construction; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract." The trouble is caused by the difficulty of ascertaining the intent of the contracting parties because of the ambiguous language often used by them. The insurer on the one hand wishes to have the terms of the contract seem liberal, and yet, in fact, admit of a strict construction favorable to him. The insured, on the other hand, generally gives little thought to the conditions of the contract until a loss has occurred.

§ 196. **Difference between Warranty and Representation.** — The Supreme Court of Connecticut <sup>1</sup> states the difference between a representation and a warranty thus: "The former precedes and is no part of the contract of insurance, and need be only materially true; the latter is a part of the contract and policy, and must be exactly and

<sup>1</sup> *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 809.

literally fulfilled, or else the contract is broken and the policy becomes void.” “A warranty, in insurance,” says the Supreme Court of Massachusetts,<sup>1</sup> “enters into and forms a part of the contract itself. It defines, by way of particular stipulation, description, condition, or otherwise, the precise limits of the obligation which the insurers undertake to assume. No liability can arise except within those limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof. From the very nature of the case, the party seeking his indemnity, or payment under the contract, must bring his claim within the provisions of the instrument he is undertaking to enforce. The burden of proof is upon the plaintiff to present a case in all respects conforming to the terms under which the risk was assumed. It must be not merely a substantial conformity, but exact and literal; not only in material particulars, but in those that are immaterial as well. A representation is, on the other hand, in its nature, no part of the contract of insurance. Its relation to the contract is usually described by the term ‘collateral.’ It may be proved, although existing only in parol and preceding the written instrument. Unlike other verbal negotiations, it is not merged in nor waived by the subsequent writing. This principle is in some respects peculiar to insurance, and rests upon other considerations than the rule which admits proof of verbal representations to impeach written contracts on the ground of fraud. Representations to insurers, before or at the time of making a contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract; its foundation, on the faith of which it is entered into. If wrongly presented, in any way material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the

<sup>1</sup> *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 389.

insurance to a risk that was never presented.<sup>1</sup> \* \* \* When statements or engagements on the part of the insured are inserted, or referred to in the policy itself, it often becomes difficult to determine to which class they belong. If they appear on the face of the policy, they do not necessarily become warranties. Their character will depend upon the form of expression used, the apparent purpose of the insertion, and sometimes upon the connection, or relation to other parts of the instrument. If they are contained in a separate paper, referred to in such a way as to make it a part of the contract, the same considerations of course will apply. But if the reference appears to be for a special purpose, and not with a view to import the separate paper into the policy as part of the contract, the statements it contains will not thereby be changed from representations into warranties. It is perhaps needless to add that verbal representations can never be converted into warranties otherwise than being afterwards written into the policy. \* \* \* The application is, in itself, collateral merely to the contract of insurance. Its statements, whether of facts or agreements, belong to the class of 'representations.' They are to be so construed, unless, converted into warranties by force of a reference to them in the policy, and a clear purpose, manifest in the papers thus connected, that the whole shall form one entire contract. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated to make it a part of the policy, it will not be so treated.<sup>2</sup> In *Daniels v. Hudson River Ins. Co.*,<sup>3</sup> the court says: 'If by any words of reference the stipulations in another instrument, such as the proposal or application, can be construed a war-

<sup>1</sup> *Kimball v. Aetna Insurance Co.*, 9 Allen, 540.

<sup>2</sup> *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; 22 Am. Dec. 567; *Snyder v. Farmers', etc., Co.*, 13 Wend. 92.

<sup>3</sup> 12 Cush. 423; 59 Am. Dec. 192.

ranty, it must be such as make it in legal effect a part of the policy.' ”

§ 197. **Breach of Warranty Avoids the Contract.** — If the contract of life insurance therefore declares that the statements made in the application touching the subject of insurance are warranted to be true, and that the policy shall be void if they are untrue, the falsity of such statements will defeat the insurance. The parties having in their contract so agreed, and having been free to agree upon whatever terms and conditions they chose, the contract being a voluntary one,<sup>1</sup> the courts have no other alternative than to give effect to the contract of the parties. The truth of the fact warranted is a condition precedent to recovery.<sup>2</sup>

§ 198. **Warranties not Favored at Law: Strict Construction.** — In determining whether or not the language of the contract imports a warranty, the courts will endeavor to discover the intent of the parties, and with a disposition, if possible, to avoid holding the statements to be warranties. The strict rule of construction as to warranties does not find favor with modern judges. Many years ago a learned jurist said: <sup>3</sup> “ The construction that our own, as well as the English courts, have unfortunately given to a warranty, is exceedingly strict, but it is too well established to be now changed by any exercise of judicial discretion. It is

<sup>1</sup> *Keim v. Home Mut. F. Ins. Co.*, 42 Mo. 38; 97 Am. Dec. 291; *Ful-  
lum v. New York U. Ins. Co.*, 7 Gray, 61; 66 Am. Dec. 462; *Brown v.  
Roger Williams Ins. Co.*, 5 R. I. 394; *Wilson v. Aetna Ins. Co.*, 27  
Vt. 99.

<sup>2</sup> *Fowler v. Aetna F. Ins. Co.*, 6 Cow. 673; 16 Am. Dec. 460; *Aetna  
L. Ins. Co. v. France*, 91 U. S. 510; *Burritt v. Saratoga, etc., Ins. Co.*, 5  
Hill, 193; 40 Am. Dec. 345; *American Popular L. Ins. Co. v. Day*, 39 N.  
J. L. 89; 23 Am. Rep. 198; *Fitch v. American Popular L. Ins. Co.*, 59 N.  
Y. 557; 17 Am. Rep. 372; *Glutting v. Metropolitan L. Ins. Co. (N. J.)*, 11  
Cent. Rep. 348; 13 Atl. Rep. 4; *Jeffries v. Economical Mut. L. Ins. Co.*, 22  
Wall. 47; also authorities cited *ante*, §§ 195, 196, and *post*, §§ 198, *et seq.*

<sup>3</sup> *Westfall v. Hudson River F. Ins. Co.*, 2 Duer, 495.



not enough that a provision construed as a warranty in its spirit and substance is fulfilled; its terms must be literally complied with. Its breach is not excused by showing that it was the result, not of choice, but of accident or necessity; that it worked no prejudice to the insurer, and not only had no influence on the loss that is claimed, but had no tendency to increase, or even vary, the risks that were meant to be assumed. If a breach, however slight, and confessedly immaterial, is proved, the entire contract is at an end, the assured loses his indemnity, and the insurer retains his premium, and rejoices in his discharge. When the provision that is claimed to be a warranty is at all ambiguous, it seems to us it is a reasonable presumption that the assured never meant to bind himself by a stipulation thus rigidly construed, and we cannot but think that this presumption, unless the words used are such as plainly, if not necessarily, to exclude it, ought to prevail.”<sup>1</sup> The Supreme Court of the United States, in a case where the application was made a part of the policy and the assured covenanted that he had made a full and just exposition of the material facts in regard to the condition, situation and value of the property, in concluding that an overestimate of the value of the property did not vitiate the policy said:<sup>2</sup> “Two constructions . . . of the contract may be suggested. One is to regard the warranty expressed in the policy as limited or qualified by the terms of the application. In that view, the assured would be held as only warranting that he had stated all material facts in regard to the condition, situation, value and risk of the property, so far as they were known to him.

<sup>1</sup> Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 497; 10 Am. Rep. 166; Miller v. Mutual Ben. Life Ins. Co., 31 Ia. 216; 7 Am. Rep. 122; Wheelton v. Hardnisty, 8 El. & B. 232; Stokes v. Cox, 1 H. & N. Exch. 320; Anderson v. Fitzgerald, 4 H. of L. Cas. 484; 17 Jur. 995; 24 E. L. & E. 1; Jennings v. Chenango, etc., Ins. Co., 2 Denio, 78; Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; 22 Am. Dec. 571.

<sup>2</sup> National Bank v. Insurance Co., 95 U. S. 678.

This is, perhaps, the construction most consistent with the literal import of the terms used in the application and the policy. The other construction is to regard the warranty as relating only to matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not to such matters as values, which depend upon mere opinion or probabilities. But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."<sup>1</sup>

§ 199. **Warranty never Created by Construction.** — It follows that a warranty will never be created by construction. As has been said in a leading case upon the subject of warranty:<sup>2</sup> "The doctrine of warranty in the law of insurance is one of great rigor, and frequently operates very harshly upon the assured. A warranty is considered as a condition precedent, and whether material or immaterial,

<sup>1</sup> *Mutual, etc., Ins. Co. v. Robertson*, 59 Ill. 123; *Kentucky, etc., Ins. Co. v. Southard*, 8 B. Mon. 634; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580; *Moulou v. American Life Ins. Co.*, 111 U. S. 335; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133.

<sup>2</sup> *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; 22 Am. Dec. 571.

as it regards the risk, must be complied with before the assured can sustain an action against the underwriters. A warranty, therefore, is never created by construction. It must either appear in express terms, affirmative or promissory, or must necessarily result from the nature of the contract. It must, therefore, appear on the face of the policy, in order that there may be unequivocal evidence of a stipulation, the non-compliance with which is to have the effect of avoiding the contract. It was once doubted whether it must not be incorporated into the body of the policy; and it was contended that it was not sufficient for it to be written in the margin. But if it appears on the face of the policy, that is sufficient.”<sup>1</sup> On this subject the Supreme Court of Alabama says:<sup>2</sup> “While warranties are not favored, and will neither be created nor extended by construction, when a warranty is expressly and in terms declared, its stipulations and conditions must be strictly complied with; the question is disembarrassed of any consideration of materiality, the parties having made it material by their agreement.”<sup>3</sup> “In considering the question,” says the Supreme Court of Massachusetts,<sup>4</sup> “whether a statement forming a part of the contract is a warranty, it must be borne in mind, as an established maxim, that warranties are not to be created nor extended by construction. They must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties.”<sup>5</sup>

<sup>1</sup> *Higbie v. Guardian M. L. Ins. Co.*, 53 N. Y. 603; *Hobby v. Dana*, 17 Barb. 114; *Burritt v. Saratoga, etc., Ins. Co.*, 5 Hill, 191; 40 Am. Dec. 345; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 157.

<sup>2</sup> *Ala. Gold L. Ins. Co. v. Garner*, 77 Ala. 215.

<sup>3</sup> *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Aetna Life Ins. Co. v. France Ins.*, 91 U. S. 510; *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89; 23 Am. Rep. 198.

<sup>4</sup> *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 391.

<sup>5</sup> *Daniels v. Hudson R. Ins. Co.*, 12 Cush. 416; 59 Am. Dec. 192; *Blood v. Howard Ins. Co.*, 12 Cush. 472; *Forbush v. Western Mass. Ins. Co.*, 4 Gray, 340.

Where, therefore, from the designation of such statements as 'statements' or as 'representations,' or from the form in which they are expressed, there appears to be no intention to give them the force and effect of warranties, they will not be so construed."<sup>1</sup> But where an application is referred to in the policy as the basis of the contract and it is agreed that it shall be deemed and taken as part of the policy and as a warranty on the part of the assured, both the application and policy are to be construed together as one entire contract. And it has been held that the statement in a policy, which makes an application part of it, and which contains various warranties on the part of the assured, and the further statement therein that any false or untrue answers or statements, material to the hazard of the risk, shall render the policy void, does not defeat or limit the express warranties contained in the policy.<sup>2</sup>

§ 200. **Must be Express.** — Warranties, therefore, never being implied, must be express. "The stipulations in policies," says Judge Savage,<sup>3</sup> "are considered express warranties; an express warranty is an agreement expressed in the policy whereby the assured stipulates that certain facts relating to the risk are, or shall be true, or certain acts relating to the same subject have been, or shall be done. It is not requisite that the circumstance or act warranted should be material to the risk; in this respect an express warranty is distinguished from a representation. Lord Eldon says: 'It is a first principle in the law of insurance, that if there is a warranty, it is a part of the contract, that the matter is

<sup>1</sup> *Houghton v. Manufacturers' Ins. Co.*, 8 Met 114; *Jones' Manufacturing Co. v. Manufacturers' Ins. Co.*, 8 Cush. 83; 54 Am. Dec. 742; *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51; *Price v. Phoenix M. L. Ins. Co.*, 17 Minn. 497; *Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

<sup>2</sup> *Chrisman v. State Ins. Co. (Or.)*, 18 Pac. Rep. 466; *ante*, §§ 196, 197, 198.

<sup>3</sup> *Duncan v. Sun F. Ins. Co.*, 6 Wend. 494.

such as it is represented to be. The materiality or immateriality signifies nothing. The only question is as to the mere fact.' ”

§ 201. **Affirmative and Promissory Warranties.** — Warranties may be either affirmative, that is those which allege affirmatively that certain facts are true; or promissory, that is, those which undertake that certain things shall or shall not be done. Promissory warranties are often also called executory. The distinction is thus illustrated by the Supreme Court of Iowa:<sup>1</sup> “ The policy in this case contains both affirmative and executory warranties: 1. The acceptance of the policy with the clause that the lower story of the building insured was, at the time the policy was effected, occupied for stores, was an affirmative or express warranty that the same was at the time so occupied. And if the representation was false, in other words, if the lower story was not then so occupied, whether material to the risk or not, would avoid the policy. 2. The upper portion of this building insured, as set forth in the policy, was to remain unoccupied during the continuance of the policy. This portion is promissory or executory, and must be strictly complied with on the part of the assured, or the policy will be avoided, whether material to the risk or not. The distinction between the affirmative, or express, and promissory, or executory, warranties is very perceptible in this case. The former represents that a certain fact did exist at the time the policy was effected; and the latter, that a certain thing should exist during the continuance of the policy — both made equally material by the parties themselves, and each fatal to the assured if false or not executed.” The promise which is to be a warranty may frequently consist only of an expression of intention. Language in a policy which imports that the assured intends

<sup>1</sup> *Stout v. City Fire Ins. Co.*, 12 Ia. 371; 79 Am. Dec. 539.

to do or not to do an act which materially affects the risk involves generally an engagement to perform or omit such act. If the assured would reserve a right to change such intention, he must employ explicit language to denote the reservation.<sup>1</sup> But this intent must always appear from the language used and the courts will not infer a warranty in promissory any more than in affirmative statements. As where the application stated that the premises insured were "occupied by Goodhue as a private dwelling" the New York Court of Appeals<sup>2</sup> held that "here was an affirmative stipulation, that the house was then occupied by Goodhue, but not a promissory agreement that he should continue to occupy it. If it had been the intention of the parties to make it a condition that he should remain the occupant during the term of the insurance, it would have been easy to say so, and there is no good reason in this case for supposing the parties intended what they have not expressed."<sup>3</sup>

**§ 202. Construction of Warranties Must be Reasonable.** — The construction of all warranties must be reasonable. A distinction, according to the later authorities, must be observed between those descriptive particulars, which are inserted in the contract merely for the purpose of identification, and those which are designed to indicate the nature, extent and incidents of the risk. These two classes of statements are to be construed with reference to the purpose for which they are respectively made. These distinctions necessarily oftener arise in cases of fire and marine than in those of life insurance.<sup>4</sup> As in all other matters of construction the object to be attained is to ascertain the

<sup>1</sup> *Bilbrough v. Metropolis F. Ins. Co.*, 5 Duer, 587.

<sup>2</sup> *O'Neill v. Buffalo F. Ins. Co.*, 3 N. Y. 123.

<sup>3</sup> *Benham v. United G. & L. Ass. Co.*, 7 Exch. 744; 14 E. L. & E. 524; 16 Jur. 691; 21 L. J. Ex. 317.

<sup>4</sup> See note to *Fowler v. Aetna F. Ins. Co.*, 6 Cow. 673; 16 Am. Dec. 466, and cases cited.

intent of the parties, and warranties will never be held to exist except upon a fair interpretation and clear intendment of the words of the parties. The construction will never be forced.<sup>1</sup>

§ 203. **Review of Rules of Construction.** — The modern rules of construction of insurance contracts in regard to warranties and representations are thus summarized by the Supreme Court of Alabama, in a recent case:<sup>2</sup> “In construing contracts of insurance, there are some settled rules of construction bearing on this subject which we may briefly formulate as follows: 1. The courts, being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the assured, and strictly against the insurer. 2. It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation, and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction. 3. Even though a warranty in name or form be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts stated in such answers, but rather a warranty of the assured’s honest belief in their truth; or in

<sup>1</sup> *Conover v. Mass. Mut. L. Ins. Co.*, 3 Dill. 217; *Campbell v. New England L. Ins. Co.*, 98 Mass. 381.

<sup>2</sup> *Alabama Gold L. Ins. Co. v. Johnson*, 80 Ala. 467; 2 South. Rep. 128 (May, 1887).

other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements or answers binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary. In support of these deductions we need not do more than refer to the following authorities.<sup>1</sup> Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy-holders, who, acting with all proper prudence, as remarked by Lord St. Leonards in the case of *Anderson v. Fitzgerald*,<sup>2</sup> had been 'led to suppose that they had made a provision for their families by an insurance on their lives, when in point of fact the policy was not worth the paper on which it is written.' The rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical conditions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earlier jurisprudence on the subject of warranties. And such, as we have said, is the tendency of the more modern authorities. There are, it is true, in this case, some expressions in both the policy and the application (which, taken together, constitute the contract of insurance) that indicate an intention to make all statements

<sup>1</sup> *Moulton v. American Life Ins. Co.*, 111 U. S. 335; *National Bank v. Insurance Co.*, 95 U. S. 673; *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Bliss Ins.*, § 34; *Campbell v. New England L. Ins. Co.*, 98 Mass. 381; *Fowler v. Aetna F. Ins. Co.*, 6 Cow. 673; 16 Am. Dec. (note) 463; *Piedmont, etc., Ins. Co. v. Young*, 58 Ala. 476; *Pars. Cont.* 465; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 309; *Wilkinson v. Conn. Mut. L. Ins. Co.*, 30 Ia. 119; 6 Am. Rep. 657; 1 *Phill. Ins.*, § 638; *Ang. Ins.*, §§ 147-147a.

<sup>2</sup> 4 H. L. Cas. 484; 17 Jur. 995; 24 E. L. & E. 1.



by the assured absolute warranties. The application, consisting of a 'proposal' and a 'declaration,' is declared to 'form the basis of the contract' of insurance, and the policy is asserted to have been issued 'on the faith' of the application. It is further provided that if the declaration, or any part of it, made by the assured, shall be found 'in any respect untrue,' or 'any untrue or fraudulent answers' are made to the questions propounded, or facts suppressed, the policy shall be vitiated, and all payments of premiums made thereon shall be forfeited. So, if there were nothing in the contract to rebut the implication, it might perhaps be held that the parties had made each answer of the assured material to the risk by the mere fact of propounding the questions to which such answers were made and that this precluded all inquiry into the question of materiality.<sup>1</sup> On the contrary, the policy purports to be issued 'in consideration of the *representations*' made in the application, and of the annual premiums. The answers are nowhere expressly declared to be warranties; nor is the application, in so many words, made a part of the contract so as to clearly import the answers into the terms and conditions of the policy. Among numerous other questions the assured was asked whether he had been affected since childhood with any one of an enumerated list of complaints or diseases, including 'fits or convulsions,' and whether he had 'ever been seriously ill,' or had been affected with 'any serious disease.' To each of these questions he answered 'no.' The concluding question is as follows: 'Is the party aware that any *untrue or fraudulent* answers to the above queries, or any *suppression of the facts* in regard to the party's health, will vitiate the policy, and forfeit all payments made thereon?' To this was given the answer, 'yes.' It is significant, as observed in a recent case before the New York Court of Appeals, that the assured 'is not asked whether he is aware

<sup>1</sup> Price v. Phoenix L. Ins. Co., 17 Minn. 497.

that any unintentional mistake in answering any of the host of questions thrust at him, whether material to the risk or not, will be a breach of warranty, and vitiate his policy.' <sup>1</sup> Then follows a declaration that 'the assured is now in good health, and does ordinarily enjoy good health,' and that in the proposal of insurance he 'had not withheld any *material* circumstance or information touching the past or present state of health or habits of life' of the assured with which the company 'should be made acquainted.' One part of the contract thus tends to show an intention to constitute the answers warranties, while the other describes and treats them as representations. There is thus left ample room for construction. What is to be understood by '*untrue*' answers, or '*any suppression of facts*?' Can they have reference to any disease with which the assured was alleged to have been afflicted, of which he knew nothing, and could not possibly have informed himself by the exercise of proper diligence? Are they intended as absolute warranties of the fact that he had never, since childhood, or during life been afflicted with diseases of which neither he nor the most skillful physician could have had any knowledge whatever? The case of *Moulor v. American Life Ins. Co.* <sup>2</sup> is a direct and strong authority for the position that the word '*untrue*' in the above connection, in its broader sense, means knowingly or designedly untrue, or recklessly so, — that it is the opposite of sincere, honest, not fraudulent. As said in that case, it is reasonably clear that, 'what the company required of the applicant as a condition precedent to any binding contract was that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which

<sup>1</sup> *Fitch v. American, etc., Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

<sup>2</sup> 111 U. S. 335.

the company ought to be made acquainted, and that by doing so, and only by doing so, would he be deemed to have made fair and true answers.' The case of *Southern Life Insurance Company v. Booker*,<sup>1</sup> sustains the same view. There the policy, as here, was conditioned to be avoided by any 'untrue or fraudulent answer' to the questions in the application. The answers were not strictly true as to the birth-place, residence and occupation of the assured. It was held that none of these being material to the risk, they would be construed as representations, although expressly declared to be 'the basis of the contract' of insurance. The court said: 'It would seem to be gross injustice to allow this (meaning the avoidance of the policy, and the forfeiture of all payments made under it), in a case where the insured has acted in the utmost good faith, and honestly disclosed every fact material to be known, because, merely by inadvertence or oversight, an error of fact has been inserted in his application,—an error that is clearly immaterial, and that could not by any possibility have affected the contract.' 'It is true that the parties have a right,' the court adds, 'to make their own contract, and by its terms we must be governed, but before a court could hold a policy void, and all premiums paid thereon forfeited, because statements of this character in the application turned out to be untrue, they should be fully satisfied that such terms were fully and distinctly agreed to by the parties.' These views, in our judgment, announce the sounder and more just doctrine, and they meet with our approval, being supported by reason, as well as by the more recent decisions in this country, on the subject of life insurance.<sup>2</sup> So, the declaration embodied in the application would seem to indicate that it is the inadvertent suppression or statement

<sup>1</sup> 9 Heisk. 606; 24 Am. Rep. 344.

<sup>2</sup> 3 Add. Contr. (Morgan's ed.), § 1123; *Price v. Phoenix M. L. Ins. Co.*, 17 Minn. 497; *Fitch v. American, etc., Ins. Co.*, 59 N. Y. 557.

only of *material* circumstances or information with which the company should in good faith be made acquainted that will vitiate the policy and cause a forfeiture. It cannot be supposed that one who, for the purpose of procuring insurance, alleges himself to be in good health, shall be understood as warranting himself to be in perfect and absolute health; for this is seldom, if ever, the fortune of any human being: and ‘we are all born,’ as said by Lord Mansfield in *Willis v. Poole*,<sup>1</sup> ‘with the seeds of mortality in us.’ These inquiries as to symptoms of diseases as said by Mr. Parsons, therefore must mean whether they ‘have ever appeared in such a way, or under such circumstances, as to indicate a disease which would have a tendency to shorten life;’ and he adds: ‘It is with this meaning the question is left to the jury.’<sup>2</sup> It has accordingly been held in an English case, cited and approved both by Mr. Parsons and Mr. Addison, that even a warranty that the person whose life is insured ‘has not been afflicted with, nor is subject to vertigo, fits,’ etc., would not be falsified by having had one fit. To forfeit the policy on this ground he must have been habitually or constitutionally afflicted with fits. ‘Even then,’ adds Mr. Parsons, ‘we apprehend the materiality of the fact would be taken into consideration; that is, for example, the policy would not be defeated by proof that the life insured, long years before, and when a teething child, had a fit.’ \* \* \* Our conclusion is that the following is a just and fair construction of the contract of insurance under consideration: 1. That the answers of the assured were not absolute warranties, but in the nature of representations; or, if warranties, they are so modified by other parts of the contract as to be warranties only of an honest belief of their truth. 2. That any untrue statement or suppression of fact, material to the risk as-

<sup>1</sup> 2 Parke Ins. 650.

<sup>2</sup> 2 Pars. Contr. 468, 471; 3 Add. Contr., § 1233.

sured, will vitiate the policy, and thus bar a recovery, whether intentional or within the knowledge of the assured or not. 3. If *immaterial*, such statement, to avoid the policy, must have been untrue within the knowledge of the assured; that is, he must either have known it, or have been negligently ignorant of it. 4. The terms of the contract rebut the implication that all symptoms of diseases inquired about were intended to be made absolutely material, unless they had once existed in such appreciable form as would affect soundness of health, or have a tendency to shorten life, and thus affect the risk."

§ 204. **Where Partial or no Answers are Made to Questions.**—It may happen that a question in an application for insurance is either partially answered or is not answered at all. In the latter case there is no warranty that there is nothing to answer.<sup>1</sup> "And so," says the Court of Appeals of New York,<sup>2</sup> "in the case of a partial answer, the warranty cannot be extended beyond the answer. Fraud may be predicated upon the suppression of truth, but breach of warranty must be based upon the affirmation of something not true." The question has most frequently come up where the applicant has stated the name of a single physician as his attendant where he has had others; in such cases the rule has been laid down that where the answer is full and complete so far as it goes and does not purport to cover all possible cases, the company should exact a fuller answer if it desired it. In one case the interrogatory was, "Name and residence of the family physician of the party, or of one whom the party has usually employed or consulted?" and the answer was "Refer to Dr. A. T. Mills, Corning, N. Y." The court of Appeals of New York said in regard to this:<sup>3</sup> "The

<sup>1</sup> *Liberty Hall v. Insurance Co.*, 7 Gray, 261.

<sup>2</sup> *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182.

<sup>3</sup> *Higgins v. Phoenix Mut. L. Ins. Co.*, 74 N. Y. 9.

language of the answer is equivocal. It neither declares Dr. Mills to have been, or to be the family physician of the applicant, or that he was the physician whom he had usually employed or consulted, or if he occupied either relation, which it was. It is only upon the ground that the statement constitutes an express warranty, and was untrue in fact, that the defense can be sustained. The answer is not responsive in terms to the interrogatory, and does not profess to give the information asked. If it was not satisfactory to the defendant, a fuller and more explicit answer should have been required. A breach of warranty as upon the affirmance of an untruth cannot be alleged in respect of an answer which does not profess to state any fact. The words of the answer cannot be extended by implication in aid of a defense founded upon a technical breach of a warranty beyond the fair import of its language and the intent of the party as indicated by its terms. It is always within the power of the insurer to have an explicit and clear affirmation as to every fact material to the risk, and if the answers to the interrogatories are not full, and do not give the information called for, they cannot be treated as affirmations of facts not stated, although called for by the interrogatories.”<sup>1</sup> The subject is further elucidated by the Supreme Court of the United States which says:<sup>2</sup> “Where an answer of the applicant to a direct question of the insurers purports to be a complete answer to the question, any substantial misstatement or omission in the answer avoids a policy issued on the faith of the application.”<sup>3</sup> But where upon the face of the application, a question appears

<sup>1</sup> *Baker v. Home Life Ins. Co.*, 64 N. Y. 648; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185; *Fitch v. American Ins. Co.*, 59 N. Y. 557; *Penn. Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; *American Ins. Co. v. Mahone*, 56 Miss. 180.

<sup>2</sup> *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183; 7 Sup. Ct. Rep. 500.

<sup>3</sup> *Cazenove v. British, etc., Ass. Co.*, 29 L. J. C. P. (N. S.) 160; 6 Jur. (N. S.) 826; 8 W. R. 243 Ex. Ch.

to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer, and render the omission to answer more fully immaterial.<sup>1</sup> The distinction between an answer apparently complete, but in fact incomplete, and therefore untrue, and an answer manifestly incomplete, and as such accepted by the insurers, may be illustrated by two cases of fire insurance, which are governed by the same rules in this respect as cases of life insurance. If one applying for insurance upon a building against fire is asked whether the property is incumbered, and for what amount, and in his answer discloses one mortgage when in fact there are two, the policy issued thereon is avoided.<sup>2</sup> But, if to the same question he merely answers that the property is incumbered, without stating the amount of incumbrances, the issue of the policy without further inquiry is a waiver of the omission to state the amount.<sup>3</sup> The English doctrine in regard to incomplete answers is more favorable to the companies.<sup>4</sup>

§ 205. When Answers are not Responsive. — Where the answers to questions in the application are not responsive they will not be considered warranties although made so by the policy. This was held in a case in the Federal court in Ohio,<sup>5</sup> where the question was whether the father or certain other relatives had been afflicted with certain

<sup>1</sup> *Conn. Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Lorillard Ins. Co. v. McCulloch*, 21 Ohio St. 176; *American Ins. Co. v. Mahone*, 56 Miss. 180; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; s. c. 44 N. J. L. 210; *Lebanon Ins. Co. v. Kepler*, 106 Pa. St. 28.

<sup>2</sup> *Towne v. Fitchburg Ins. Co.*, 7 Allen, 51. See also *Wright v. Equitable Life, etc., Soc.*, 50 How. Pr. 367.

<sup>3</sup> *Nichols v. Fayette Ins. Co.*, 1 Allen, 63.

<sup>4</sup> *London Ass. v. Mansel*, 11 Ch. D. 363; 48 L. J. Ch. 381; 41 L. T. 225; 27 W. R. 444.

<sup>5</sup> *Buell v. Conn. Mut. L. Ins. Co.*, 2 Flipp. 9.

diseases, and continued, "If so, state full particulars of each case?" The reply was: "No, father died from exposure in water, age 58." In fact the father died at the age of 30. The court held the latter part of the answer not responsive and therefore a representation, stating the rule thus: "Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this case in reference to the age of the father at death, being a mere representation, does not constitute a defense unless it appears to have been material as well as false."<sup>1</sup>

§ 205a. **Qualified Answers.** — If the answers of the applicant to the questions in the application are limited or qualified by any particular or general expression, clearly showing an intention so to limit or qualify his statements, effect will be given to such intent. Thus, where the question was whether certain relatives of the applicant had been afflicted with any hereditary disease and he replied, "Not to my knowledge," it was held by the Supreme Court of the United States<sup>2</sup> that the affirmation was narrowed down to what the applicant himself personally knew touching the subject. And to make out the defense sought to be established, that the answer was false, the company must show that the disease existed, that it was hereditary and that both of these things were known to the applicant when he answered the question. So, where the answers in the application were qualified by the words at its foot: "The above is as near correct as I remember it," it was held,<sup>3</sup> that, to defeat recovery on the policy, the applicant must

<sup>1</sup> Protection Ins. Co. v. Harmer, 2 Ohio St. 473.

<sup>2</sup> Insurance Co. v. Gridley, 100 U. S. 614.

<sup>3</sup> Aetna Ins. Co. v. France, 94 U. S. 561.



have been consciously incorrect in some one of the answers. In another case<sup>1</sup> the applicant stated that the facts recited in his application were "true to the best of his knowledge and belief." It was held that it would not avail the company to show that such facts were false, unless it also showed that at the time the statements were made the applicant knew them to be false.<sup>2</sup>

§ 206. **Representations.** — In the course of the preceding discussion much has been said in regard to representation as contra-distinguished from warranty, and in speaking of the latter many characteristics of the former have been mentioned. A representation has been defined to be a verbal or written statement made before the issuance of the policy as to some fact, or state of facts, tending to induce the insurer more readily to assume the risk, or to assume it for a less premium, by diminishing the estimate he would otherwise have formed of it.<sup>3</sup> Another definition<sup>4</sup> is, that it is "a statement of facts, circumstances, or information, tending to increase or diminish the risks, as they would otherwise be considered, made prior to the execution of the policy by the assured or his agent to the insurer, in order to guide his judgment in forming a just estimate of the risks he is desired to assume. It is usually made by parol or by a writing not inserted in the policy, but when the intention as to the construction is sufficiently declared, may be expressed in the policy." It is extrinsic, collateral and incidental to the contract, because a presentation of the elements upon which to estimate the risk and the basis of the undertaking to be entered into.<sup>5</sup> The Supreme Court of

<sup>1</sup> *Clapp v. Mass. Benefit Assn. (Mass.)*, 6 N. Eng. Rep. 103; 16 N. East. Rep. 433.

<sup>2</sup> See also *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 549.

<sup>3</sup> *Arnould on Ins.*, § 182; *Bliss on Life Ins.*, § 35.

<sup>4</sup> 2 *Duer on Ins.* 644.

<sup>5</sup> *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 381; *Daniels v. Hudson River Ins. Co.*, 12 Cush. 416; 59 Am. Dec. 192.

of Alabama happily says: <sup>1</sup> “A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient, if representations be substantially true. They need not be strictly nor literally true. A misrepresentation renders the policy void on the ground of *fraud*, while a non-compliance with a warranty operates as an express *breach* of the contract.” <sup>2</sup>

§ 207. **Material and Immaterial Representations.**—The natural division of representations is into those which are material and those which are immaterial, the former having a tendency to influence the insurer to make the contract, and the latter not having any influence upon him. These definitions become more clear as we discuss particular examples.

§ 208. **Affirmative and Promissory Representations.**—According to some authorities representations are divided, like warranties, into affirmative and promissory. It has, however, been denied that there is any such thing as a promissory representation, although the text-book writers have approved the division.<sup>3</sup> It has been said<sup>4</sup> that, “Language in a policy which imports that it is intended to do or omit an act which materially affects the risk, its extent or

<sup>1</sup> Alabama Gold Life Ins. Co. v. Johnson, 80 Ala. 467; 2 South. Rep. 128.

<sup>2</sup> Price v. Phoenix Mut. Ins. Co., 17 Minn. 497; 10 Am. Rep. 166; Fisher v. Crescent Ins. Co., 33 Fed. Rep. 549; Moulor v. Am. Ins. Co., 111 U. S. 335; Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183; Thomson v. Weems, 9 App. Cas. 671.

<sup>3</sup> May on Ins., § 182.

<sup>4</sup> Bilbrough v. Ins. Co., 5 Duer, 587.

nature, is to be treated as involving an engagement to do or omit such act." This statement has been approved by the Federal court in at least one case<sup>1</sup> where the engagement was that the policy should be void "if any of the statements and declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue." In the application the language used was that the applicant "declares" that he does not now and will not practice any pernicious habit tending to shorten life. The court held as follows: "In this policy such statement and declaration is, in substance, incorporated into and made part of the policy. The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of the expectation or belief of the insured. I am, therefore, led to the conclusion that the clause in the policy imports an agreement that future pernicious habits shall not be entered into, and that if the insured thereafter practices any pernicious habit that obviously tends to shorten life, the policy will be thereby avoided." The Supreme Court of Pennsylvania, upon the same state of facts came to a different conclusion. The defendant in both cases was the same and the language of the application and policy identical. In this case<sup>2</sup> the court said: "It is unnecessary to discuss the question as to whether the declarations of the insured as to existing facts in his application constitute a warranty. The authorities are by no means uniform on this point. Our own case of the Washington Life Insurance Company *v.* Schaible,<sup>3</sup> holds that they do not constitute such warranty. Where, however, the policy has been issued upon faith of such representations, and they are false in point of fact, the better

<sup>1</sup> *Schultz v. Mut. Life Ins. Co.*, 6 Fed. Rep. 672.

<sup>2</sup> *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 120; 35 Am. Rep. 641.

<sup>3</sup> 1 W. N. C. 369.

opinion seems to be that the policy is avoided. And this is so even where the false statement is to a matter not material to the risk.<sup>1</sup> In such case the agreement is that if the statements are false, there is no insurance; no policy is made by the company, and no policy is accepted by the insured. In the case in hand the policy attached. There was nothing to avoid it *ab initio*. Were the mere declarations by the insured in his application, as to his future intentions, and his failure to carry out his declarations, or to comply with his intentions as to his future conduct, sufficient to work subsequent forfeiture of the policy? In no part of the application did the assured covenant that he would not practice any pernicious habit. Nor did he promise, agree or warrant not to do so. He *declared* that he would not. To declare, is to state; to assert; to publish; to utter; to announce; to announce clearly some opinion or resolution; while to promise is to agree; 'to pledge one's self; to engage; to assure or make sure; to pledge by contract.'<sup>2</sup> There is no clause in the policy which provides that if the assured shall practice any pernicious habit tending to shorten life, the policy shall *ipso facto* become void. There is only the stipulation that, 'if any of the statements or declarations made in the application \* \* \* shall be found in any respect untrue, the policy shall be null and void.' This evidently referred to a state of things existing at the time the policy was issued. As to such matters, as I have already said, there was no untrue statement. But the assured declared, as a matter of intention, that he *would not* practice any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that 'it was so.' The assured might well have intended to adhere to his declarations in the most perfect good faith, yet in a moment of temptation have been overcome

<sup>1</sup> Jeffries v. Life Ins. Co., 22 Wall. 47.

<sup>2</sup> Worcester.

by this insidious enemy (intemperance). In the absence of any clause in the policy avoiding it in case the assured should practice any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application sufficient to avoid the policy." In a Massachusetts case,<sup>1</sup> the Supreme Court of that State said: "The word, 'representations,' has not always been confined in use to representations of facts existing at the time of making the policy; but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with), are sometimes called 'promissory representations,' to distinguish them from those relating to facts, or 'affirmative representations.' And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract,

<sup>1</sup> Kimball v. Ætna Ins. Co., 9 Allen, 542.

which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract." This opinion goes on to state that if the oral promise be made *mala fide*, and with the intention to mislead and deceive, the fraud will have the same effect as the material falsity of an affirmative representation. But if made *bona fide*, and without intention to mislead, or deceive, it cannot be set up to avoid a contract. Only those promissory representations are available for such a purpose which are reduced to writing and made part of the contract, thus becoming substantially, if not formally, warranties.<sup>1</sup> It is eminently reasonable, as well as consistent with authority, that promissory representations, when false, should avoid the contract only when they are either made under such circumstances that their breach substantially amounts to a fraud upon the insurer, or else when they are incorporated into the policy in such way as to become virtually warranties.<sup>2</sup>

**§ 209. False Representations avoid contract only when Material.** — We have seen that in case of warranties the question of materiality cannot arise because the truth of the facts is made material by the contract itself, but, inasmuch as representations are collateral and form only an

<sup>1</sup> *Prudential Assurance Soc. v. Ætna L. Ins. Co.*, 52 Conn. 579; 23 Blatchf. 223; 23 Fed. Rep. 438; *May on Ins.*, § 182.

<sup>2</sup> See *post*, § 323.

inducement, to the contract, they avoid it only when material, or in other words have led the insurer into an engagement he would have been less likely to have entered into if the statement or representation had not been made or if he had known that the representations were untrue. The Supreme Court of Massachusetts says on this point: <sup>1</sup> "When the insurer seeks to defeat a policy upon this ground, (false representations) his position in court is essentially different from that which he may hold upon a policy containing a like description of the risk as one of its terms. It is sufficient for the plaintiff to show fulfillment of all the conditions of recovery which are made such by the contract itself. The burden is then thrown upon the defendant to set forth and prove the collateral matters upon which he relies. There is also another distinction very important in its practical application. As this defense relates entirely to the substance and not to the letter of the contract, it can only prevail by proof of some representation material to the risk, and that it was untrue in some material particular. \* \* \* The answers contained in the application being in the nature of representations only, the question is of their substantial and not their literal truth. To defeat the policy they must be shown to be materially untrue, or untrue in some particular material to the risk."

§ 210. **Immaterial whether False Representation is Intentional or Accidental.** — It is immaterial whether the misrepresentation was intentional or accidental. "It is not necessary, in all cases," says the Court of Appeals of New York,<sup>2</sup> "in order to sustain a defense of misrepresentation in applying for the policy to show that the misrepresentation was intentionally fraudulent. A misrepresentation is defined by Phillips to be where a party to the contract

<sup>1</sup> *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 390.

<sup>2</sup> *Armour v. Transatlantic F. Ins. Co.*, 90 N. Y. 455.

of insurance, either purposely, or through negligence, mistake or inadvertence, or oversight, misrepresents a fact which he is bound to represent truly<sup>1</sup> and he lays down the doctrine that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. If the misrepresentation induces the insurer to enter into a contract which he would otherwise have declined, or to take a less premium than he would have demanded had he known the representation to be untrue, the effect as to him is the same if it was made through mistake or inadvertence, as if it had been made with a fraudulent intent, and it avoids the contract. An immaterial misrepresentation, unless in reply to a specific inquiry, or made with a fraudulent intent and influencing the other party, will not impair the contract. But if the risk is greater than it would have been if the representation had been true, the preponderance of authority is to the effect that it avoids the policy, even though the misrepresentation was honestly made.<sup>2</sup> A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself.<sup>3</sup> In this case (which was a case of fire insurance) Story, J., says: 'A false representation of a material fact is, according to well settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design.' The assured, having given an untrue answer, whether by accident, mistake or design, it matters not, to a direct, plain and practical question, he cannot afterwards be heard to say it was immaterial.<sup>4</sup>

<sup>1</sup> Phill. on Ins., § 537.

<sup>2</sup> Phill. on Ins., §§ 537-542; Wall v. Howard Ins. Co., 14 Barb. 383.

<sup>3</sup> Carpenter v. Am. Ins. Co., 1 Story C. C. 57.

<sup>4</sup> Davenport v. New England Ins. Co., 6 Cush. 340; Day v. Mutual Ben.



§ 211. **Materiality of Representation Question of Fact.** — Where any doubt exists as to the materiality of the misrepresentation, it is a question of fact for the jury.<sup>1</sup> The Supreme Court of Massachusetts says upon this subject:<sup>2</sup> “ It is true that a representation need not, like a warranty, be strictly and literally complied with, but only substantially and in those particulars which are material to be disclosed to the insurers to enable them to determine whether they will enter into the contract; and that, where the question of materiality of such particulars depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by the jury. But where the representations upon which the contract of insurance is based are in writing, their interpretation, like that of other written instruments, belongs to the court; and the parties may, by the frame and contents of the papers, either by putting representations as to the quality, history or relations of the subject insured into the form of answers to specific questions, or by the mode of referring to them in the policy, settle for themselves that they shall be deemed material; and, when they have done so, the applicant for insurance cannot afterwards be permitted to show that a fact which the parties have thus declared material to be truly stated to the insurers, was in

*L. Ins. Co.*, 1 *McArthur*, 41; 29 *Am. Rep.* 571; *Anderson v. Fitzgerald*, 4 *H. of L. Cas.*, 484; 2 *Big.* 341; *McCoy v. Metropolitan Life Ins. Co.*, 133 *Mass.* 82; *Ætna L. Ins. Co. v. France*, 91 *U. S.* 510; *Foot v. Ætna L. Ins. Co.*, 61 *N. Y.* 571; *Baker v. Home Life Ins. Co.*, 64 *N. Y.* 648; *Cushman v. United States Life Ins. Co.*, 63 *N. Y.* 404; *Galbraith v. Arlington, etc., Ins. Co.*, 12 *Bush*, 29; *Powers v. N. E. Mutual Life Assn.*, 50 *Vt.* 630; *Metropolitan L. Ins. Co. v. McTague*, 49 *N. J. L.* 587; 9 *Atl. Rep.* 766; 8 *Cent. Rep.* 611; *Cazenove v. British Equitable Ins. Co.*, 29 *L. J. C. P.* 160; 6 *Jur. (N. S.)* 826; 8 *W. R.* 243.

<sup>1</sup> *Armour v. Transatlantic F. Ins. Co.*, 90 *N. Y.* 450; *Mut. Benefit L. Ins. Co. v. Miller*, 39 *Ind.* 475; *Campbell v. New England M. L. Ins. Co.*, 98 *Mass.* 395; *Washington Mut. L. Ins. Co. v. Haney*, 10 *Kan.* 525.

<sup>2</sup> *Campbell v. N. E. Life Ins. Co.*, 98 *Mass.* 402.

fact immaterial, and thereby escape from the consequences of making a false answer to such a question.”<sup>1</sup>

§ 212. **Answers to Specific Questions always Material.** — Where a specific question is asked and the applicant makes an untruthful answer, the policy is avoided whether the answers are warranties or representations, because “the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material.”<sup>2</sup> On this point the Supreme Court of Iowa has said:<sup>3</sup> “A misrepresentation by one party of a fact specifically inquired about by the other, though not material, will have the same effect in exonerating the latter from the contract as if the fact had been material, since, by making such inquiry, he implies that he considers it so. In all jurisprudence this distinction is recognized. It is particularly applicable to written inquiries referred to in a policy. The rule is so because a party, in making a contract, has a right to the advantage of his own judgment of what is material, and if by making specific inquiry, he implies that he considers a fact to be so, the other party is bound by it as such.”<sup>4</sup> Representations of this kind differ from warranties in that a substantial compliance with them is sufficient to answer their terms. Whether there has been such substantial compliance, that is whether the representation is, in every material respect, true, is a question of fact for the jury. But it is not for the jury to say that the representation, though substantially untrue, is, notwithstanding, immaterial. An illustration will make plain the view of the court. Suppose that, in answer

<sup>1</sup> *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; 17 Jur. 995; *Von Lindeman v. Desborough*, 3 M. & Rob. 45; 8 B. & C. 586; 3 C. & P. 350.

<sup>2</sup> *Phoenix Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183.

<sup>3</sup> *Miller v. Mutual Benefit L. Ins. Co.*, 31 Ia. 232; 7 Am. Rep. 122.

<sup>4</sup> 1 Phil. on Ins., § 342; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 401.

to a specific question, the assured states that his age is a week or a month greater. The question would be a proper one for the jury to say whether the representation, though strictly and technically untrue, was not substantially and materially true. But suppose it appears, from the evidence, that the age of the assured is fifty, instead of thirty, years. It is not the province of the jury to say that the representation, though untrue, is immaterial." It is not within the province of the jury, under the guise of determining whether the statements of the applicant were substantially true or false to find that diseases and infirmities were not material to be disclosed when the parties had, by the form of the contract of insurance and of the contemporaneous written application conclusively agreed to consider them material. That is, it is for the court to rule whether or not a matter is material, and for the jury to determine whether the statements concerning such matters, ruled material, were substantially true.<sup>1</sup> And yet, as we shall see, it has often been left to the jury to say whether certain statements in the application were material to the risk.

**§ 213. Representations to be Material Need not Always be of Facts Relating Directly to the Risk.**— In order to be material a representation need not necessarily be of facts relating directly to the risk. If the applicant makes false statements as to some incidental matters, as for example concerning his pecuniary means, or his social or business relations, from which an inference can be drawn as to the propriety of accepting or declining the risk, they will avoid the policy, provided the jury, for it is a question of fact to

<sup>1</sup> *Campbell v. New England L. Ins. Co.*, 98 Mass. 401; *Davenport v. New England Ins. Co.*, 6 Cush. 341; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 233; *Phoenix M. L. Ins. Co. v. Raddin*, 120 U. S. 183; *Day v. Mutual Ben. L. Ins. Co.*, 1 McArthur, 41; 29 Am. Rep. 565; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Jeffries v. Life Ins. Co.*, 22 Wall. 47; *Co-operative, etc., Assn. v. Leflore*, 53 Miss. 1.

be left to a jury, find that the insurer was influenced by them, or, in other words, that they were material elements in the making of the contract. This doctrine has been laid down by the text-books,<sup>1</sup> and also in an old English case,<sup>2</sup> and it has been approved by the Court of Appeals of New York.<sup>3</sup> In that case the insured, Schumacher, was, it was claimed, represented to be a partner in the firm of Valton, Martin & Co., and the moneyed man of the concern, when, in fact, he was only the porter who worked in the store, and the false representation was made by Martin, who was with the insured and took an active part in effecting the insurance and was one of the payees of the policy. In this case the court said: "The judge, among other things, charged the jury that if the insured untruly represented that he was a partner of the firm of Valton, Martin & Co., or, that if he untruly represented that he was the moneyed man of the firm, and either or both of such untrue representations were material to the risk, then the policy was avoided, and there could be no recovery. That if Schumacher was dead in September, 1850, and his occupation that of a merchant at the time the proposals were signed, and the representations of his being a partner, or the moneyed man of the firm, were either not untrue or not material to the risk, then the action was *prima facie* sustained. The defendant's counsel requested the court to charge the jury that if Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was a partner of the firm of Martin, Valton & Co., when in fact at that time he was not such a partner, and if the defendants would not have issued the policy if the representation had not been made, then the policy was void and the plaintiffs could not recover. The judge declined so to charge, and the defendant's coun-

<sup>1</sup> Arnould on Ins., p. 530; 2 Duer, 632; 3 Kent Comm. 282.

<sup>2</sup> Sibbald v. Hill, 2 Dow's Parl. R. 263.

<sup>3</sup> Valton v. National, etc., Soc., 20 N. Y. 32.

sel excepted. The defendant's counsel also requested the judge to charge the jury that if they found that Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was the moneyed man of the concern of Valton, Martin & Co., when in fact at that time he was not such, and that the defendants would not have issued the policy if the representations had not been made, then the policy is void and the plaintiffs cannot recover. The judge refused so to charge, and the defendant's counsel excepted. The charge of the judge was correct as far as given. If the representations were made, and false, the falsity must have been known to Schumacher and Martin. The facts were within their knowledge, and the representations fraudulent. The requests to charge, considered in connection with the charge given, present the question whether fraudulent representations made by the assured to the insurer upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. This question has not been determined by any adjudged case in this State, so far as I have been able to discover. The elementary writers hold that the policy may be avoided. In *Sibbald v. Hill*<sup>1</sup> it was held that when the assured fraudulently represented to the underwriter that a prior insurance by another underwriter upon the same risk had been made at a less premium than it was in fact made, the policy was vitiated. In this case it is obvious that the risk itself was not affected by the representations. Lord Eldon, in his opinion, says that it appeared to him settled law, that if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it

<sup>1</sup> 2 Dow's Parl. R. 263.

turned out that this person had not in fact underwritten the policy, or had done so under such terms that he came under no obligation to pay, it appeared to him settled law that this would vitiate the policy. The courts in this country would say that this was a fraud; not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted. The principle of this case, when applied to the one under consideration, shows that the judge committed an error in refusing to charge as requested. It is clear that the circumstance of a party being engaged in commercial business, possessed of large means, might induce an insurer to make an insurance upon his life for a large amount, while were he a mere porter, the risk would be rejected, although the chance of life would be as good in the latter situation as in the former."<sup>1</sup> So, where the residence of the applicant was stated at Fisherton Anger and it appeared that she had been in jail there, it was left to the jury to say whether the fact was material and ought to have been communicated.<sup>2</sup>

**§ 214. Representations Need only be Substantially True : Good Faith of Applicant.** — It is enough, however, if representations be substantially true; in this respect being unlike warranties, which are always material, and which must be literally true. The authorities are not, however, perfectly clear on this point, for in some cases, it has been held that the element of good faith enters so far into the construction of statements warranted to be true that it is enough if they are substantially true. An interesting case was decided by the Supreme Court of Minnesota,<sup>3</sup> where the insured had stated that he had not had

<sup>1</sup> Higbie v. Guardian Mut. L. Ins. Co., 53 N. Y. 603.

<sup>2</sup> Huguenin v. Rayley, 6 Taunt. 186; Rawlins v. Desborough, 2 M. & Rob. 328.

<sup>3</sup> Price v. Phoenix Mut. L. Ins. Co., 17 Minn. 518; 10 Am. Rep. 166.

rheumatism, when he, in fact, had had sub-acute rheumatism, which is not ordinarily considered a disease. In this case the court said: "The rheumatism referred to in the question is the *disease* of rheumatism. Any rheumatic affection not amounting to the *disease* of rheumatism, is not comprehended in its terms, any more than the spitting of blood occasioned by a wound of the tongue, or the extracting of a tooth, is the *disease* of 'spitting of blood' mentioned in the same question. The life insured had the right to answer the question upon the basis that its terms were used in their ordinary signification. If there was any ambiguity in the question, so that its language was capable of being construed in an ordinary, as well as in a technical sense, the defendant can take no advantage from such ambiguity."<sup>1</sup> So, the Supreme Court of the United States has said:<sup>2</sup> "It is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is, that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense, afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he had never been so afflicted, being untrue, avoided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such diseases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not. Looking into the application, upon

<sup>1</sup> *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159.

<sup>2</sup> *Moulou v. American Life Ins. Co.*, 111 U. S. 335.

the faith of which the policy was issued and accepted we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them in active form, without at the time being conscious of the fact, and beyond the power of any one, however learned or skillful, to discover. Did the company expect, when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain? We shall be aided in the solution of these inquiries by an examination of other questions propounded to the applicant. In that way we may ascertain what was in the minds of the parties. Beyond doubt, the phrase, 'other known cause,' in the fourteenth question, serves the double purpose of interpreting and qualifying all that precedes it in the same clause or sentence. For instance, the applicant was not required to state all the circumstances, within his recollection, of his family history, but those only which rendered the proposed insurance more than usually hazardous, and of which he had personal knowledge, or of which he had information fairly justifying a belief of their existence. If he omitted to state circumstances in his 'family history' of



which he had no knowledge, nor any information deserving attention, that omission would not avoid the policy, although it subsequently appeared that those circumstances, if known to the company, would have shown that the proposed insurance was more than usually hazardous. Apart from other questions or clauses in the application, the tenth question would indicate that an incorrect or untrue answer as to whether the applicant's 'father, mother, brothers or sisters had been affected with consumption, or any other serious family disease, such as scrofula, insanity,' etc., would absolve the company from all liability. Yet in the fourteenth question, the insured, being asked as to his family history and as to 'hereditary predispositions'—an inquiry substantially covering some of the specific matters referred to in the tenth question—was, as we have seen, only required to state such circumstances as were known to him, or of which he had information, and which rendered an insurance upon his life more than usually hazardous. So, in reference to that part of the fourteenth question relating to the then physical condition of the applicant. Suppose, at the time of his application, he had a disease of the lungs or heart, but was entirely unaware that he was so affected. In such a case he would have met all the requirements of that particular question, and acted in the utmost good faith, by answering no, thereby implying that he was aware of no circumstance in his then physical condition which rendered an insurance upon his life more than usually hazardous. And yet, according to the contention of the company, if he had, at any former period of his life, been afflicted with a disease of the heart or lungs, his positive answer to the seventh question, that he had not been so afflicted, was fatal to the contract; this, although the applicant had no knowledge or information of the existence at any time of such a disease in his system. So, also, in reference to the inquiry in the fourteenth question as to any

‘constitutional infirmity’ of the insured. If, in answering that question, he was required to disclose only such constitutional infirmities as were then known to him, or which he had reason to believe then existed, it would be unreasonable to infer that he was expected, in answer to a prior question in the same policy, to guarantee absolutely, and as a condition precedent to any binding contract, that he had never, at any time, been afflicted with diseases of which, perhaps, he never had, and could not have any knowledge whatever. The entire argument in behalf of the company proceeds upon a too literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him, were, in any respect, untrue. What was meant by ‘true’ and ‘untrue’ answers? In one sense, that only is true which is conformable to the actual state of things. In that sense a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word ‘true’ is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made ‘fair and true answers.’ If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to

the company what he knew or should have known was material to the risk, and that, consequently, for the want of 'fair and true answers,' the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and, therefore, whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury."<sup>1</sup> The general disposition of the courts in matters of construction of applications is thus stated by the Kentucky Court of Appeals.<sup>2</sup> "Forfeitures are regarded by courts with but little favor, and while the non-payment of premiums or a representation of facts fraudulently or innocently made, if untrue and material to the risk, or such as would induce the insurer to enter into the contract, must prove fatal to the policy, when minute and trivial questions are propounded and answered, having no bearing or influence on the minds of those about entering into the contract, and not material to the risk, the parties cannot be affected by them. An honest belief in the truth of the statement made, when not material to the risk, should not avoid a policy if the statement should prove to be untrue, and to adjudge that it works a forfeiture is contrary to the intent and meaning of the parties, and subversive of that rule of good faith and fair dealing, that should enter into and form a part of every insurance contract." As further illustrative of the principle that the representations of the applicant in his answers to questions in the application need be only substantially true, we may cite an opinion of the

<sup>1</sup> Alabama Gold Life Ins. Co. v. Johnson 80 Ala. 467; 2 South. Rep. 130; Miller v. Mutual Ben. Life Ins. Co., 31 Ia. 229; Langdon v. Union M. L. Ins. Co., 14 Fed. Rep. 272; Campbell v. New England Mut. Life Ins. Co., 98 Mass. 405; Phoenix Mut. Life Ins. Co. v. Raddin, 120 U. S. 183; Fowkes v. Manch. & Lond., etc., Ins. Co., 3 B. & S. 917; 32 L. J. Q. B. 153; 11 W. R. 622; 8 L. T. (N. S.) 309.

<sup>2</sup> Germania Ins. Co. v. Rudwig, 80 Ky. 235.

Supreme Court of the United States. In this case the defense was that the applicant had falsely answered the question, "Have you ever had any of the following diseases, \* \* \* affection of liver?" by saying, "No." The court said:<sup>1</sup> "It seems to the court, however, that the company by its question sought to know whether the liver had been so affected that its ordinary operations were seriously disturbed, or its vital power materially weakened. It was not contemplated that the insured could recall, with such distinctness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury, or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, — that is, of a character so well-defined and marked as to materially derange for a time the functions of that organ, — the answer that he had never had the disease called affection of the liver was a 'fair and true' one; for such an answer involved neither fraud, misrepresentation, evasion, nor concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted." This case was followed by the Federal court in Indiana, where the applicant had answered, "no," to the question whether he had ever had "spitting or raising of blood." The court held,<sup>2</sup> that this answer was true although on one occasion the applicant had "spit blood," and that the only warranty implied by the terms of the question was not that he had never had spitting or raising of blood, but that he had never had the *complaint* of spitting or raising blood, or "had blood-spitting in such form as to be called a disease,

<sup>1</sup> Connecticut Mut. L. Ins. Co. v. Union Trust Co., 112 U. S. 250; 5 Sup. Ct. Rep. 119.

<sup>2</sup> Dreier v. Continental Life Ins. Co., 24 Fed. Rep. 670.

disorder, or constitutional vice." The court continues: "If the question put to the applicant for the insurance had been whether or not he had had any spitting of blood, or had had any symptom of disease, such as spitting or raising of blood, it would doubtless have required the disclosure of a single instance of blood-spitting."<sup>1</sup>

**§ 215. Understanding of Applicant as to Effect of False Answers.** — In many applications for insurance a question is included asking what the understanding of the applicant is as to the effect of untrue answers upon the contract, or oftener, if the applicant does not understand that the contract will be avoided under certain conditions. Such statements in the application cannot control the legal construction of the policy afterwards issued and accepted, although the application warrants the facts stated therein to be true, and the policy is expressed to be made in consideration of the warranties made in the application. "The statements expressing his understanding of what will be the effect of the insurance are statements not of fact, but of law, and cannot control the legal construction of the policy afterwards issued and accepted."<sup>2</sup>

**§ 216. Answers to Questions in Applications for Membership in Benefit Societies Generally not Warranties but Representations.** — As a general thing the answers in a medical examination or an application for membership in a benefit society are not warranties but representations. In a case in the Federal court of New York, where the form of the agreement, however, was not given,<sup>3</sup> the court says: "The question of law is whether, under Semm's applica-

<sup>1</sup> On this point the opinion cites: *Geach v. Ingall*, 14 M. & W. 95; 2 Big. L. & A. Ins. R. 306; *Insurance Co. v. Miller*, 39 Ind. 475; *Vose v. Eagle*, etc., Ins. Co., 6 Cush. 42; *Cushman v. Ins. Co.*, 70 N. Y. 72.

<sup>2</sup> *Accident Insurance Co. v. Crandall*, 120 U. S. 533.

<sup>3</sup> *Semm v. Supreme Lodge, etc.*, 29 Fed. Rep. 895.

tion to Humboldt lodge for membership therein and the certificate which he received from said lodge, he warranted the truth of the answer which he gave to the question, 'Have you been rejected by the medical examiner of any lodge or society?' In my opinion, he was required, under the contract, to answer the question according to his knowledge or reasonable means of belief, and not to misrepresent or suppress known facts, but that he did not warrant the absolute truth of his answers." In a case in Indiana the Supreme Court held as follows: <sup>1</sup> "Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or, in some appropriate method, referred to in that instrument. The statements by the insured in his application are not set forth in the policy, nor in any way is reference made to them, and they cannot be considered warranties." The question was more squarely presented in a case in Illinois,<sup>2</sup> where the application concluded: "It is hereby declared, that the above are fair and true answers to the foregoing questions, in which there is no misrepresentation or suppression of known facts; and I acknowledge and agree that the above statement shall form the basis of the agreement with the society." In an action on the policy the defense was that false answers had been made in the application which avoided the policy. The Supreme Court, in passing upon the matter, said: "The answers, of course, enter into the application, because, if for no other reason, assured expressly agreed they should be the basis of the agreement with the society; but the effect that shall be given to the representations is the principal question in dispute between the parties. Appellant claims they were intended to be, and should be, held to constitute a warranty of their truth, and if any or either of them are

<sup>1</sup> *Presbyterian Mut. Ass. Fund v. Allen*, 106 Ind. 593.

<sup>2</sup> *Illinois Masons, etc., v. Winthrop*, 85 Ill. 537.

shown to be untrue, whether their falsity was known, or whether intentionally or unintentionally the truth was concealed, or it was only from the want of memory, or by inadvertence, there can be no recovery. On the other hand, it is contended that the answers are not warranties but simply representations; and that, if made in good faith, although some one or more of them may be untrue, if the misstatement was not intentional, but was made in good faith and under the belief that the statements were true, the misstatement did not operate to avoid the policy. The clause stating that the assured agreed 'that the statement shall form the basis of the agreement with the society,' is different from the agreements usually contained in life policies. In such instruments it is usually agreed, that the statement is a warranty and that if any part of it should prove to be untrue, the policy should be void. With persons of ordinary intelligence, the language used in this application would not be so understood. Nor do we suppose that the promoters of this enterprise, when they adopted this form, intended that it should operate as a warranty, such as is usually inserted in life policies. Nor can we suppose for a moment that they would adopt a form of words that would be understood one way by the applicant and would be construed another by the courts, and thus cheat, wrong or defraud a brother. Such a supposition cannot be for a moment entertained. If the language employed was intended to operate as the usual warranty, we apprehend it has not been so understood by those, or any portion of them, who had applied for membership before the death of Price. If intended as an absolute warranty that the statement and every part of it was true, why limit the previous part of the statement to 'no misrepresentation or suppression of known facts?' This the company required of each applicant, and when they made that requirement, they, by implication, absolved him from any

injurious consequences from misrepresentation or failure to disclose unknown facts. If a warranty was required of the answers to some of these questions, it would be useless for persons to become members of the society. Each applicant is required to answer the question, whether he is able to earn a livelihood for himself and family. Now, with the great majority of men, this is problematical. That power depends upon so large a number of circumstances that a prudent man might well hesitate to answer it in the affirmative. The solution of this question depends, with most men, so decidedly on such a variety of contingencies, that almost any man, whatever his mental or physical endowments, would be regarded as extremely rash to warrant that he could. If able at the time, what guaranty that he could do so for any definite period? Does this statement require that he should remain so during life or for a shorter period? And if so, for what period? It is manifest that all that can be required of the applicant is, that he should give to this question an answer based on an honest, fair and intelligent belief. The applicant is also asked if his ancestors generally reached old age. Now, who are his ancestors, referred to in this interrogatory? How many generations back is it intended to extend? And, suppose the applicant, on slight or unreliable information, answers in the affirmative, do the directors suppose they can show the misinformation and defeat a recovery? If such a construction is to be given to this application, then members, if not wronged, cheated, or defrauded, are, we have no doubt, generally deceived unintentionally. Suppose, to the question whether the applicant is, at the time, in good health, the answer is in the affirmative, is every slight obstruction to the performance of their proper functions by the various organs of the system to be held as a breach of warranty, and to avoid the policy? Such, we presume was never intended to be the construction given to the answer, as



all know that but a small percentage of the human family are entirely free from some infirmity, slight or serious. There is the question whether the applicant has ever had any serious illness or personal injury. Suppose the applicant answers in the negative, may the society show that the applicant, in his early infancy, and so far back that it is beyond memory's reach, had serious illness, and defeat a recovery, although he had never been informed of the fact? That would be a fact that would, in all probability, be wholly unknown to him, and neither party intended that a negative answer should be a warranty that it did not so occur, and a misrepresentation or suppression of such an unknown fact was intended to be included in the exception in the statement. It was only known facts that were not to be misrepresented or suppressed. \* \* \* From what has been said, we are unable to hold that the statement was made or intended as a warranty of the absolute truth of the answers, but the statement was only designed to insure honesty and good faith in making them. Otherwise the statement would not have contained the limitation that they were true and fair answers, 'in which there is no misrepresentation or suppression of known facts.' ''<sup>1</sup> If the applicant is a foreigner, with an imperfect knowledge of the language, this circumstance must be considered in determining the meaning of the words he has used.<sup>2</sup>

§ 217. **Concealment.** — According to the law of insurance concealment is the designed and intentional withhold-

<sup>1</sup> *Morrison v. Odd-fellows, etc., Ins. Co.*, 59 Wis. 165; *Clapp v. Mass. Ben. Assn. (Mass.)*, 16 N. East Rep. 433; 6 N. Eng. Rep. 103; *Snett v. Relief Society*, 78 Me. 541; *Mut. Benefit Ins. Co. v. Miller*, 39 Ind. 475; *Grossmann v. Supreme Lodge, etc., Sup. Ct. N. Y.*, not reported; *Northwestern Benev., etc., Assn. v. Cain*, 21 Ill. App. Ct. 471; *Sup. Council Royal Arcanum v. Lund*,—Ill. App. Ct. 1888.

<sup>2</sup> *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197.

ing of any fact, material to the risk, which the assured in honesty and good faith ought to communicate; and any fact is material, the knowledge or ignorance of which would naturally influence an insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance. All representations which enter into the essence of the contract, and which go to lay the foundation of it, whatever would cause the company to accept or reject the application, should be truly stated.<sup>1</sup>

§ 218. **Concealment of Material fact will Avoid the Contract.** — The concealment of a material fact, if inquiry is made upon such point, will avoid the policy, although the assured did not suppose the fact to be material.<sup>2</sup> “The concealment which vitiates the policy must be such as misleads, or deceives; such as a partial disclosure, omitting matters of importance, which, if disclosed, would make the answer full; as if the answer about former sickness detail a slight illness, concealing a much more serious and recent sickness; as if the question be whether the applicant had ever been seriously hurt by an accident, and the answer be that an arm was broken ten years ago, when the truth was that a serious internal injury was received by a fall from a carriage. \* \* \* If, in answer to the fifteenth question, Dillard had said he had ‘made an application to the Continental company, which he had *withdrawn*,’ when the truth was, he had also made application to two other companies, which had been rejected, it would be a case of concealment which would avoid the policy, because the answer suggests that there was no objection to the risk, whereas two companies had declined to take it. The answer to this ques-

<sup>1</sup> *Clark v. Union M. F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; *Locke v. North American F. Ins. Co.*, 13 Mass. 61; *Kimball v. Aetna Ins. Co.*, 9 Allen, 540.

<sup>2</sup> *Vose v. Eagle, etc., Ins. Co.*, 6 Cush. 42; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *Burritt v. Saratoga Co., etc., Ins. Co.*, 5 Hill, 188.

tion is valuable to the insurer, as it opens the avenue to further inquiry, if the company desires to pursue the investigation.”<sup>1</sup>

§ 219. **Questions of Knowledge, Intent and Materiality are for Jury.** — The question of knowledge concerning a fact and the intent of the party in withholding it and the question of materiality are for the jury.<sup>2</sup> On this point the Supreme Court of Massachusetts says:<sup>3</sup> “The question whether the facts, if misrepresented, were known to the applicants, was a question of fact, to be left to the jury upon the evidence. The considerations referred to, as founding a legal conclusion of knowledge, are all fit and proper to be submitted to a jury; such as, that the assured and applicant is himself the owner of the property, and may be presumed to be acquainted with its condition; that the matter relates to things open and visible, things capable of distinct knowledge and not depending upon estimate, opinion, or mere probability; things in respect to which an owner is bound in honesty and good faith to know, takes upon himself to know, and usually does know; these and all other pertinent evidence bearing on the question are to be left to the jury, with directions that if they are satisfied from all the evidence, and can reasonably infer, that the assured did know the fact as it really existed, in regard to which misrepresentation is imputed, they are to find that he did know it; otherwise, not.”

<sup>1</sup> *American Ins. Co. v. Mahone*, 56 Miss. 192; *London Assurance v. Mansel*, 11 Ch. Div. 363; *Story v. Williamsburgh M., etc., Assn.*, 95 N. Y. 474.

<sup>2</sup> *Burritt v. Saratoga, etc., Ins. Co.*, 5 Hill, 188; *Mutual Benefit Ins. Co. v. Wise*, 34 Md. 582; *Gates v. Madison, etc., Ins. Co.*, 2 N. Y. 43; *Mallory v. Travelers Ins. Co.*, 47 N. Y. 52; *Monroe, etc., Ins. Co. v. Robinson*, 5 W. N. C. (Pa.) 389; *Virginia, etc., Ins. Co. v. Kloeber*, 31 Gratt. (Va.) 749.

<sup>3</sup> *Houghton v. Manufacturers, etc., Ins. Co.*, 8 Met. 121; 41 Am. Rep. 489.

§ 220. **No Concealment when Facts are Unknown to Applicant: Difference between Representation and Concealment.** — Logically speaking there can be no concealment of a fact not known to the applicant, for one cannot conceal that of which he is ignorant. The subjects of representation and concealment are so closely allied that it is hard to tell where the dividing line is. Representation seems to be the active and positive statements of the party, while concealment is the want or omission of a statement. The connection and nature of these subjects will be clearer after discussion of the numerous decisions construing specific words and questions generally found in applications, which will close the present chapter.

§ 221. **Error or Fraud of Agent in Preparing Application.** — It is often the case that an applicant for insurance answers correctly the questions propounded, but the agent of the company, in writing down the replies, either from accident or design, changes the statement or omits it altogether, or fills in the answer from information obtained from another source. The question then arises whether the company is bound by the acts of its agent, so as to be estopped from insisting upon the forfeiture of the policy for a breach of the warranty of the truth of the statements in the application, or because of the false representations of the assured. The determination of this matter depends largely upon the fact whether the agent of the company is to be considered the agent of the assured in filling out the application. In some of the cases decided there was an express stipulation in the policy making the agent of the company the agent of the insured in preparing the application. The earlier decisions were favorable to the company upon this question, but the modern authorities are practically unanimous in holding that where the agents make out the applications incorrectly, notwithstanding the applicant has stated all the facts correctly, the errors will be chargeable to the insurer and

not to the insured. The reason of this conclusion is that the insurance companies clothe the agents whom they send out to solicit business with an apparent authority, so that those dealing with them have a perfect right to regard them as the full and complete representatives of the companies by which they are employed, in all that is said and done in regard to the application.<sup>1</sup> This doctrine was followed although the companies, in order to avoid its application, had inserted in the policy a stipulation generally as follows: "It is a part of this contract that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in the policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." But the courts said that no man can serve two masters and no stipulation can successfully attempt such a logical and legal impossibility and have the same person guard two antagonistic interests at the same time. That if the agent was the agent of the company in the matter of making out and receiving the application he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. No mere form of words could wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. "There is no magic power," said the Supreme Court of Illinois,<sup>2</sup> "residing in the words of that stipulation to transmute the real into the unreal. A device of mere words cannot, in a case like this, be im-

<sup>1</sup> *Rowley v. Ins. Co.*, 36 N. Y. 550; 3 *Keyes*, 557; *McCall v. Phoenix Mut. Ins. Co.*, 9 W. Va. 237; 27 *Am. Rep.* 558; *Simmons v. Ins. Co.*, 8 W. Va. 474; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 36 *Am. Rep.* 617; *Boos v. Ins. Co.*, 64 N. Y. 236; *Baker v. Ins. Co.*, 64 N. Y. 648; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Merserau v. Ins. Co.*, 66 N. Y. 274; *Miner v. Phoenix Ins. Co.*, 27 *Wis.* 693; 9 *Am. Rep.* 479.

<sup>2</sup> *Commercial Ins. Co. v. Ives*, 56 *Ill.* 402.

posed upon the view of a court of justice in the place of an actuality of fact." The Supreme Court of Minnesota added:<sup>1</sup> "If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice."<sup>2</sup>

§ 222. **When Authority of Agent is Known to Applicant.**—In spite of the great array of authority, however, in favor of this proposition, much depends upon the special circumstances of each case. In a case, which afterwards went to the Supreme Court of the United States, in the the Eastern District of Missouri,<sup>3</sup> the rule was applied on the trial below where the facts were these: The deceased was solicited by the agent of the company to take out the insurance and he, finally consenting to do so, was told that it was necessary, as a mere form, to answer certain questions. The agent read to him these questions and as he answered the agent pretended to take down and write in the blank the substance of the answers, not reading them over to the assured nor telling him what he had written. When the applicant was asked whether he had any disease of the kidneys he said that his condition was well known to the agent, who was aware that he had been sick and under treatment for diabetes, that the doctor's office was opposite and he could go there and find out everything. The applicant signed the paper without reading it. The answer in regard to disease of the kidneys was written in the ap-

<sup>1</sup> *Kausal v. Minnesota, etc., Ins. Co.*, 31 Minn. 17; 47 Am. Rep. 776.

<sup>2</sup> *Insurance Co. v. Wilkenson*, 13 Wall. 222; *Insurance Co. v. Mahone*, 21 Wall. 152; *Flynn v. Equitable L. Ins. Co.*, 78 N. Y. 568; 34 Am. Rep. 561; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521; *Campbell v. Merchants', etc., Ins. Co.*, 37 N. H. 35; 72 Am. Dec. 324; *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 216; 7 Am. Rep. 122; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 389; *Plumb v. Ins. Co.*, 18 N. Y. 392. See *ante* § 153 *et seq.*

<sup>3</sup> *Fletcher v. New York L. Ins. Co.*, 14 Fed. Rep. 846.

plication "No." The policy when issued had attached to it a copy of the application and a memorandum calling the attention of the insured to it and requesting that any errors in the application be reported to the company for correction. The assured died of diabetes and the false answer of the applicant was set up in defense to the action on the policy. The court instructed the jury that if the assured answered the questions correctly and the false answers were written in by the agent, without the knowledge of the assured, and if the assured did not know of the misstatement until after the policy was issued, then such action of the agent was a fraud upon the assured, and the policy was not avoided. Upon the appeal of this case to the Supreme Court of the United States,<sup>1</sup> it was reversed, the court, after stating that the company had a right to limit the authority of its agents if knowledge of such limitations was brought home to those having dealings with such agents, continues thus: "The present case is very different from *Insurance Co. v. Wilkenson*,<sup>2</sup> and from *Insurance Co. v. Mahone*.<sup>3</sup> In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance 'as the full and complete representative of the company in all that is said or done in making the contract;' and the court held that the powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he

<sup>1</sup> *New York Life Ins. Co. v. Fletcher*, 117 U. S. 531.

<sup>2</sup> 13 Wall. 222.

<sup>3</sup> 21 Wall. 152.

dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements. \* \* \* The instruction given to the jury in the case before us, is, in effect, that the assured was bound by his application if it was not avoided for fraud, and that it was so avoided by reason of the false statements contained in it, and that, therefore, the plaintiff, as his representative, could recover. But if the application was avoided, it would seem to be a necessary consequence that the policy itself was also avoided, and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed the jury that if the application was avoided for fraud, he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, al-



though upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained. There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot, after his death, be avoided.”<sup>1</sup> In a case where the application was signed by the applicant and taken away by the agent and filled out incorrectly by him, it was held by the Supreme Court of Michigan<sup>2</sup> that the beneficiary in an action on the policy “had the right to show by her testimony that the answers made by her daughter at the house were incorrectly written in by the agent after he went to his office, or that he filled in answers at such office that were not made at the house by Victoria (the assured). As such answers, if made by the agent, and not by Victoria, or without her knowledge or consent, could not bind her, the fact that they were so made could be established by parol. If the application had not been signed until filled out, a different rule might prevail.”<sup>3</sup> If the proposal for insurance be prepared by the

<sup>1</sup> *Ryan v. World Mut. L. Co.*, 41 Conn. 168, 19 Am. Rep. 490; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; *American Ins. Co. v. Neiberger*, 74 Mo. 167; *Richardson v. Maine Ins. Co.*, 46 Me. 394.

<sup>2</sup> *Brown v. Metropolitan L. Ins. Co.*, 32 N. W. Rep. 610; 8 West. Rep. 775.

<sup>3</sup> *Ante*, § 152, *et seq.*

agent and he incorrectly report the answers of the applicant, and if there be no fraud or collusion between the agent and the insured, the contract may be reformed in equity, and made to conform to the true facts stated to the agent.<sup>1</sup>

**§ 223. Answers to Referee: To Medical Examiner: Position of Latter.** — If the policy so refers to the answers of a mutual friend, or referee, or to the answers of the applicant to the medical examiner as to warrant their truth and make them a part of the contract, they are warranties, otherwise they are representations which must be substantially true.<sup>2</sup> The medical examiner has a wide latitude in his examination and the answers of the applicant must be substantially true. The object of a physical examination of a person proposing to insure his life in an insurance company, by a competent physician, is to ascertain whether he is laboring under, or is subject to, any diseases or defects which may have a tendency to shorten life. “It is impossible,” says the New York Court of Appeals,<sup>3</sup> “to affix limits to the subjects, into which it is not only proper but necessary for an examining surgeon to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk. Whether I am right or wrong in these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk, as affecting in some degree the

<sup>1</sup> *Franklin F. Ins. Co v. Martin*, 40 N. J. L. 568; *Collett v. Morrison*, 9 Hare, 162; *In re Universal Non-Tariff F. Ins. Co.*, L. R. 19 Eq. 385; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283. The effect of fault or fraud of agent will be further considered when we come to speak of estoppel. See *post*, § 426 *et seq.* Also *ante*, § 152, *et seq.*

<sup>2</sup> *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia. 235; *United Brethren, etc., Soc. v. Kintner*, 12 W. N. C. (Pa.) 76.

<sup>3</sup> *Valton v. Loan Fund, etc., Soc.*, 1 Keyes, 21.

life; and they are a legitimate subject of inquiry for the examining physician or surgeon." Where the medical examiner writes down false answers, when true information is given, there can be no misrepresentation. In a case in New York the facts were that the medical examiner was required by his instructions from the company to write the answers to the questions in his own handwriting and not to allow any person to dictate any portion of them. In answer to a question calling for the family history of the applicant he stated correctly the cause of the death of a sister. At the time the insured signed his name to the certificate, the answer had not been written in by the examiner; he subsequently filled in the cause of death is "not known to applicant." Under the facts the court held:<sup>1</sup> "He (the examiner) was the agent of the defendant for the purpose of reporting the answers to the questions referred to and was so held out to Terence Grattan. He was, as medical examiner, charged with certain duties by the defendant, and was acting in concert with the soliciting agent of the company. On the part of the life insured was entire good faith and truthfulness, and there is no reason to suspect any intentional unfairness on the part of the examiner. The omission was inadvertent. Is the company thereby released from its obligation? Many decisions in this court show that it is not."<sup>2</sup> Within the principle therein recognized as well established, the erroneous answer must be taken as the declaration of the defendant, and any controversy depending upon it must, as between the parties, be taken as true. In this case, the physician was not the agent to solicit insurance, but he had an act to perform in regard to it, as the agent of the company. His written instructions were to write out the answers. In this in-

<sup>1</sup> Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 293; 36 Am. Rep. 617.

<sup>2</sup> Mowry v. Rosendale, 74 N. Y. 360 and cases cited.

stance he failed to do it correctly. The principle upon which it has been held that the company and not the insured, is responsible for the error of the soliciting agent, is equally applicable here. This question has been repeatedly considered by this court and in the recent case of *Flynn v. The Equitable Life Ins. Co.*,<sup>1</sup> was again before us. The point presented was similar to the one under review. The decision was in conformity with the views above expressed, and the doctrine referred to must be deemed settled. Nor was it incompetent to prove by parol the actual transaction between the insured and the medical examiner. It was proper to do this in reply to the defendant's case, without reforming the contract or asking for equitable relief. Fraud and breach of warranty in regard to his sister's death, is averred in the answer, and the matter given in evidence was proper in reply thereto. If sufficient as the foundation for equitable relief or ground for reforming the contract, it was not improper to receive in this action evidence which would defeat the defendant's claim, or which would be competent in any action in a court of equity. This advantage is secured to the litigant by the union of legal and equitable remedies in one system."<sup>2</sup> This opinion was adhered to in a subsequent case in the same court, and reason supports the view that the medical examiner is the agent of the company upon whom the burden rests if he incorrectly reports the answers of the applicant.<sup>3</sup> So, also where a printed application to a life insurance company was referred to in the policy and made a part thereof. The application was headed "Questions to be asked by the medical exam-

<sup>1</sup> 78 N. Y. 568; 34 Am. Rep. 561.

<sup>2</sup> *Emery v. Pease*, 20 N. Y. 62; *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462.

<sup>3</sup> *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 285; *Co-operative Life Assoc. v. Leflore*, 53 Miss. 20; *United Breth., etc., Soc v. Kintner*, 12 W. N. C. (Pa.) 76; *Mutual Benefit L. Ins. Co. v. Wise*, 34 Md. 582; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603

iner, who will fully explain the questions and witness the answers and signature of the person examined." At the time of an examination the medical examiner made certain verbal explanations of the meaning of these printed questions. The court held<sup>1</sup> that the applicant for insurance might properly infer, from what was stated in the caption to the questions, that in answering them he should do so with reference to the construction and explanation given at the time, and if the questions were explained and unanswered in good faith, according to the interpretation put upon them at the time by the representative of the company, there could be no objection to proving the facts and submitting them to the jury, notwithstanding the insured warranted the truth of his answers to the questions. The court approved the instruction to the jury of the judge below that "if in good faith the insured answered these questions in view of the interpretation that was presented to him by the agent, then, gentlemen, there is no fraud; and if such you find to be the case, you must read in these interrogatories the explanation made by the agent at the time, and then read his answers to the interrogatories in the light of such explanations." Rejection by the medical examiner of a company renders false the answer of the applicant that he has not been rejected by any other company.<sup>2</sup> But a negative answer to the question whether application has been made to any other company for insurance, is true although an application had in fact been made to another company which had not been passed on.<sup>3</sup> Where the medical examiner or agent upon a statement of the facts, suggests the answer, the company afterwards will not be heard to say that it is untrue.<sup>4</sup>

<sup>1</sup> Connecticut General L. Ins. Co. v. McMurdy, 89 Pa. St. 363.

<sup>2</sup> Edington v. Aetna L. Ins. Co., 100 N. Y. 536.

<sup>3</sup> Langdon v. Union Mut. L. Ins. Co., 14 Fed. Rep. 272.

<sup>4</sup> Higgins v. Phoenix, etc., Ins. Co., 74 N. Y. 6.

**§ 224. Rules of Construction in Particular Cases.**—A clearer idea of the nature of warranties and representations and of the rules of construction of answers of the applicant in his application will be gained from an examination of particular cases where a direct ruling of the court has been had upon specific matters contained in the application. We shall proceed therefore to refer to some of these cases relating to such matters as age, condition, occupation, habits, health and residence of applicant, serious injury, sickness and questions relating to intemperance.

**§ 225. Age.**—Where it is provided that if any of the statements made by the applicant as the basis of the contract shall be found in any respect untrue, then the policy shall be void, a misrepresentation as to age will avoid the the policy. The question of age is so material that a false statement in regard to it will be fatal whether regarded as a representation or a warranty.<sup>1</sup> Where an applicant for admission to a voluntary association for mutual relief, the rules of which did not admit members over sixty years of age, stated his age, in his application to be fifty-nine years, when in fact he was sixty-four years of age, it was held by the Supreme Court of Maine<sup>2</sup> that the misrepresentation avoided the contract of insurance issued thereon. In this case the court says: “The age of the applicant was a material fact. If more than sixty he could not become a member. His representation of the fact was a warranty of its truth, and if not true, the contract was invalid. This rule is so uniformly held by the courts that no authorities

<sup>1</sup> *Hunt v. Supreme Council Chosen Friends (Mich.)*, 7 West. Rep. 875; 31 N. W. Rep. 576; *United Brethren, etc., Soc. v. White*, 100 Pa. St. 12; *Ætna Life Ins. Co. v. France*, 91 U. S. 510; *Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329; 1 South. Rep. 561; *Hartigan v. International, etc., Soc.*, 8 Low. Can. Jur. 203; *Linz v. Mass. Mut. L. Ins. Co.*, 8 Mo. App. 363; *May on Ins.*, § 305.

<sup>2</sup> *Swett v. Citizens' Mut. Rel. Soc.*, 78 Me. 541; 7 Atl. Rep. 394; 3 N. Eng. Rep. 288

need be cited.” But where the agent of a life insurance company filled in the answers in the application, and the applicant, an old man who spoke English imperfectly, stated to the agent that he did not know his age, and the agent wrote in a certain age, which turned out to be incorrect, and upon the trial of an action upon the policy issued upon such application, the agent testified that on the applicant’s failure to state his age, he expostulated with him and then obtained some *data* from him which he (the agent) did not then recollect, and from them he computed the age, and inserted it in the application, the Court of Appeals of New York held that an estoppel *en pais* was fairly established and the company was precluded from setting up the falsity of the statement with reference to age in avoidance of the policy.<sup>1</sup>

§ 226. **Whether Applicant is Married or Single.**—If the question is asked whether the applicant is married or single the answer must be true, for by asking the question the insurer has shown that an answer was considered material. The question arose in *Jeffries v. Life Insurance Company*, in the Supreme Court of the United States,<sup>2</sup> where it was argued that it was immaterial because, in this case, the insured having answered that he was single, when in fact he was married, and being married made the risk better, the company was not injured. The court says: “This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements

<sup>1</sup> *Miller v. Phoenix Mut. Life Ins. Co.*, 107 N. Y. 292; 10 Cent. Rep. 38; 14 N. East. Rep. 271.

<sup>2</sup> 22 Wall. 47.

and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true, if he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company. There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal. The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material and to leave that point to the determination of a jury.”<sup>1</sup>

§ 227. **Residence.** — When the residence of the applicant is asked the meaning is that the ordinary place of abode of the person should be given. “The term *resi-*

<sup>1</sup> United Brethren Mut. Aid Soc. v. White, 100 Pa. St. 12.



dence," says the Supreme Court of Alabama,<sup>1</sup> "as employed in the questions propounded to the assured, was intended to signify the place of permanent, rather than mere temporary abode, in the sense of *domicile*, rather than of mere *inhabitancy*. It is undisputed that the *domicile* of the assured was truly stated, and that his sojourn in Kentucky was merely temporary. The *domicile*, and the place of temporary residence, are each within the territorial limits, in which according to the stipulation of the policy, the assured had the right to visit or reside. The policy and the application must be construed together. Residence, as employed in the one, must have the same signification it bears in the other, there being no indication of an intention to employ them in a differing signification. The word visit is manifestly employed in contradistinction to the word reside. The one conferring the right to travel and sojourn, and the other the right to acquire domicile by residence with the intention of remaining." <sup>2</sup>

§ 228. **Occupation.** — The occupation of the applicant, which is required to be disclosed, means the business in which he is engaged at the time of making the application. "If it meant the trade he had learned in his youth and which he had followed years before, it would indeed be immaterial whether he told the truth or a falsehood, and it would have been mere folly in the insurers to ask him the question." <sup>3</sup> So, where the applicant stated that he was a "laborer," and it appeared that, as a matter of fact, he had suspended labor for several years prior to making the application, either on account of old age, or other continuous disability, it was held by the Supreme Court of Penn-

<sup>1</sup> *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

<sup>2</sup> *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Rep. 344; *Perrins v. Marine, etc., Ins. Soc.*, 2 El. & El. 317; 29 L. J. Q. B. 242; 6 Jur. (N. S.) 627; 8 W. R. 563.

<sup>3</sup> *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 478.

sylvania,<sup>1</sup> that the answer was misleading and the policy thereby avoided. "It is indeed true," says the court, "that the rule would not embrace a merely temporary suspension of the alleged occupation, but it does embrace a suspension extending through several years, or resulting from old age or other continuous disability." The New York Court of Appeals<sup>2</sup> has held where, in the application for the policy, in answer to the question as to the occupation of the deceased, the answer was "soda-water maker," and the medical examiner's certificate, required to be signed by the applicant, stated in answer to an inquiry as to the occupation of the applicant that "he is out of doors most of the time selling soda-water," and it appeared that the deceased both made and sold soda-water, that the answers were to be taken together and stated the facts correctly. And, where the applicant stated his occupation to be "manufacturing," and it was shown that during the month the application was made insured kept a billiard saloon, and that for years previous he had been engaged in manufacturing soda-water, and was about to resume this business, the court held<sup>3</sup> that the question might have been understood as calling for the usual rather than the temporary occupation, and there was no breach of warranty. In England it was held that a representation that the applicant was an "esquire" was sufficient, if true, although he was at the time engaged in business as an ironmonger. This was on the ground that the statement was not untrue, but imperfect.<sup>4</sup> If the statement of present occupation is true a subsequent change will not avoid the policy, unless it is so stipulated in the contract.<sup>5</sup>

<sup>1</sup> *Mutual Aid Society v. White*, 100 Pa. St. 12.

<sup>2</sup> *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617.

<sup>3</sup> *Mowry v. World Mutual Life Ins. Co.*, 7 Daly, 321.

<sup>4</sup> *Perrins v. Marine & Gen. Tr. Ins. Co.*, 2 El. & El. 317; 29 L. J. Q. B. 242; 6 Jur. (N. S.) 627; 8 W. R. 563. See also *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606.

<sup>5</sup> *Provident Life Ins. Co. v. Fennell*, 49 Ill. 180.

§ 229. *The Dwight Case.* — One of the most interesting cases relating to life insurance questions, discusses this matter of occupation, and also the principles of construction of life insurance contracts and deserves somewhat full extracts. It is the famous case of *Dwight v. Germania Life Insurance Co.*<sup>1</sup> In this case, by the terms of the contract, the assured warranted the truth of his answers to questions in his application, and compliance with the terms of the warranty was held to be a condition of the contract, so that any substantial deviation from the truth in an answer must be assumed to be material to the risk so as to forfeit the policy. The court proceeded as follows: "Among the facts which the defendant deemed it important to know before entering into a contract of insurance with the deceased, was his previous business and occupation. The materiality of truthful information in relation thereto was impressed upon the applicant by specific inquiries, and the requirement that truthful answers thereto should be made the condition of a valid contract. With the view of eliciting the information desired, a series of questions was proposed to the deceased embracing not only an inquiry as to his general business and occupation, but special inquiries as to certain particular trades and employments. Among those which we deem it important to refer to in this case were the following: 'A. For the party whose life is proposed to be assured, state the business, carefully specified? Ans. Real estate and grain dealer. B. Is this business his own or does he work for other persons, and in what capacity? Ans. His own. C. In what occupation has he been engaged during the last ten years? Ans. Real estate and grain dealer. D. Is he now, or has he been engaged in or connected with the manufacture or sale of any beer, wine or other intoxicating liquors? Ans. No.' \* \* \* Upon the trial it appeared that Dwight was engaged in the busi-

<sup>1</sup> 103 N. Y. 341; 4 Cent. Rep. 529; 8 N. East. Rep. 654.

ness of keeping hotel at Binghamton, from May, 1874, until March, 1877, and that during that period he regularly and systematically sold wines and liquors, in bottles of various sizes, bearing the name of his hotel blown in the glass, to such of his guests as desired them. He kept a wine or liquor room in which was stored a large supply of wines and liquors, and each year while so engaged he applied, paid for and received, from the representatives of both the State and National Governments, licenses and permits, authorizing him to carry on the business of selling beer, wine and liquors at retail, to be drank upon his premises. It also appeared that he kept no bar and did not sell to persons who were not his guests. These facts were undisputed. Their absolute truth was assumed by the trial judge in charging the jury, and by the general term in passing upon the appeal to that court. That the answer given by Dwight to the questions (relating to the sale of liquor) was incorrect was admitted by both tribunals. That Dwight did not misconceive the meaning and intent of the question conclusively appeared from repeated answers made by him to other companies within three weeks prior to this time to similar questions in applications for other insurance in which he stated that he had kept a hotel for three years in which liquor was sold in packages. Upon denying the motion for a nonsuit, the trial court refused to pass upon the question as to whether the facts constituted a breach of warranty or not, but left it to the jury to say whether the sales of liquor, proved to have been made, were sales at all, within the intent and meaning of the contract. In this, we think that the court erred, no question arising upon the evidence which authorized its reference to the jury. If there was any room for doubt in respect to the true meaning and intent of the inquiry answered by the deceased, it presented a question of law for the court to determine, and not one

for the jury.<sup>1</sup> But we are of the opinion that no such doubt existed in the case. The contract was in writing, subscribed by the parties, and they expressed their agreement in clear, unambiguous and intelligible language. Its import and meaning was not obscured by any reference to the situation and circumstances, surrounding the transaction, or by the consideration of other parts of the same instrument. On the contrary, an examination of the context and associated questions make more certain and definite its object and intent. The assured had been previously interrogated as to his general business and employment, and it is to be assumed had given such answers in respect thereto, as satisfied the object of the inquirer. He was then specially requested to state whether he was then, or had been, engaged in, or connected with the manufacture or sale of *any* beer, wine, or other intoxicating liquors. The information called for was made material, not only by the express agreement of the parties, but also by the object for which it was required, plainly apparent from the nature of the transaction. The question called for no opinion, and was capable of a precise, definite and categorical answer. It was intentionally framed in broad and comprehensive terms, apparently to avoid any evasion of its object; but was, nevertheless, expressed in clear and unambiguous language. If an intention to inquire concerning the conduct of the regular or principal business of the assured could be implied from the use of the word 'engaged,' an idea that such was the only meaning of the question was negatived by the further words, 'or *connected* with the manufacture or sale of *any* beer, etc., which pointed unmistakably to every transaction of the kind described, however limited its character, or remote his connection with it, might have been. The motive prompting the question was reasonable, natural and proper, and apparent even to the most careless reader.

<sup>1</sup> *Lomer v Mecker* 25 N. Y. 361; *Glacius v. Black*, 67 N. Y. 563.

The inquiry could not have referred to the general business employment of the insured, because inquiries on that subject had previously been exhausted, and the question had no office to perform in that respect. It carried upon its face the object which the insurer had in making it, and required an answer as to whether the applicant was, or had been, engaged in, or connected with, the manufacture or sale of liquors, etc., not in a limited or restricted capacity or employment, but in any and every way in which such acts could have been performed. The question itself assumes that persons engaged in or connected with the manufacture or sale of liquors in any manner were more hazardous subjects for insurance than those occupied in more reputable employments, and that the insurer would regard such employment as an objection to the proposed contract. The extent to which the employment affected the character of the applicant, or his value as a risk, was a question solely for the insurer. The defendant had a right to a full and frank disclosure of any and all facts bearing upon the subject, and this confessedly it did not obtain. It was misinformed as to the precise fact which had been agreed upon as a fact material for it to know, in determining the propriety of entering into the proposed contract, and by the party who had assented to the proposition, that such information should invalidate any contract made. If the fair import of the language used, indicates that the interrogatory intended to include within its scope and meaning single transactions or incidental occupations, neither courts nor juries have authority to say that such transactions may properly be disregarded in the answer made. The defendant must be deemed to have meant what it said, and its express language embraces all transactions, and its express contract has made every transaction of the kind referred to, material to the risk. \* \* \* We are also of the opinion that the answers of the assured to the questions relating to his business and

occupation, were evasive and untrue, and, upon the whole evidence required the dismissal of the complaint. There was not only an absence of satisfactory evidence in the case that he had ever been engaged in the business of a real estate or grain dealer, for himself in the ordinary acceptance of those terms, but such an acceptance was negatived by his repeated sworn declarations to the contrary, and the proof of circumstances of the most convincing character. The evidence upon these questions is substantially all to the same effect, and presents a case so preponderating in character, that a verdict against it could not be allowed to stand. The case, therefore, presented a question of law as to whether the business engaged in by the deceased, constituted him a dealer in real estate and grain, within the ordinary meaning of those terms."

**§ 230. Answers in Regard to Parents, Relatives, etc. —**

The age of the parents of the applicant at the time of their death, the diseases of which they died, and facts relating to the relatives and family of the applicant are all material and must be truly stated. Answers to these questions assumes knowledge, as in a case, where the assured in his application answered "no" to the question whether either of his parents, brothers or sisters had ever had pulmonary, scrofulous or other constitutional or hereditary diseases, in which it was held that the answer assumed his knowledge of the fact and, in an action on the policy, the beneficiary was precluded from alleging the want of knowledge on the part of the insured as an excuse for not answering correctly.<sup>1</sup>

**§ 230α. Family Physician. —** Where questions are asked as to the family physician, or medical attendant, of the applicant, they must be answered truthfully and in good faith.

<sup>1</sup> Hartford L. & A. Ins. Co. v. Gray, 91 Ill. 159.

Whether this has been done or not is generally a question for the jury.<sup>1</sup> As the object of the question is to obtain the name of a medical attendant who can give information as to the quality of the life proposed, the failure to give full information may amount to a concealment, as where the applicant gave the name of a casual medical attendant, but did not give the name of a physician who had recently attended him for delirium tremens, it was held that the duty of the applicant was to have made a full disclosure.<sup>2</sup> So, where the applicant was asked to state the physician usually employed by him, and if he had none, to name any other doctor who could be applied to for information as to the state of his health, and he answered "none," and it was shown that he had occasionally applied to a physician for serious ailments and had been examined for insurance and rejected by another physician, it was held that the failure to state the names of the two physicians was a fraudulent concealment and avoided the policy.<sup>3</sup> The Supreme Court of Minnesota<sup>4</sup> define the term "family physician" as follows: "The phrase 'family physician' is in common use, and has not, so far as we are aware, any technical signification. As used in this instance, and for the purposes of the testimony appearing in this case, the chief justice and myself are of opinion that it may be sufficiently defined as signifying the physician who usually attends and is consulted by the members of the family in the capacity of physician. We employ the word usually, both because we do not deem it necessary to constitute a person a family

<sup>1</sup> *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580; *Maynard v. Rhodes*, 1 C. & P. 360; 5 D. & R. 266; *Scoles v. Universal Life Ins. Co.*, 42 Cal. 523; *Cushman v. United States Ins. Co.*, 70 N. Y. 72; *Edington v. Mutual, etc., Ins. Co.*, 67 N. Y. 185.

<sup>2</sup> *Hutton v. Waterloo, etc., Soc.* 1 F. & F. 735.

<sup>3</sup> *Horn v. Amicable, etc., Ins. Co.*, 64 Barb. 81; *Huckman v. Fernie*, 3 M. & W. 505; 1 H. & H. 149; 2 Jur. 444.

<sup>4</sup> *Price v. Phoenix L. Ins. Co.*, 17 Minn. 497; 10 Am. Rep. 166.



physician that he should invariably attend, and be consulted by the members of a family in the capacity of a physician, and because we do not deem it necessary that he should attend and be consulted as such physician, by each and all of the members of a family. For instance, the testimony in this case shows that at the time when the application for insurance was made, the family of Richard Price consisted of himself, his wife and two or three children. We think that a person who usually attended and was consulted by the wife and children of Richard Price as a physician, would be the family physician of Richard Price in the meaning of the interrogatory, although he did not usually attend on, and was not usually consulted as a physician by Richard Price himself." A dissenting opinion was filed in this case, the judge reasoning that, as the object of the question is to obtain the name of a person who can give information as to the risk, it obviously requires the name of the physician who ordinarily attends the party to be given. The opinion concludes: "I think the phrase, as used in this instance, means the physician who usually attends and is consulted by all or most of the members of the family of the person whose life is assured, and that the person thus assured, if he has medical attendance, must be one of the members attended by such physician." The phrase, "family physician" is said by the Supreme Court of Missouri<sup>1</sup> to be one that is in common use and has no particular, definite or technical signification. It signifies one who usually attends and is consulted by the members of a family in the capacity of a physician; it means one who is accustomed to attend, and not one who occasionally attended. The mere calling at a doctor's office for some medicine to remove a temporary indisposition, not serious in its nature, cannot be considered an attendance by a physician, nor would the calling at the

<sup>1</sup> Reid v. Piedmont & Arlington L. Ins. Co., 58 Mo. 421.

home by the doctor for the same purpose be so regarded. Attendance of a physician, in the meaning of the question generally employed in applications for life insurance, must be an attendance upon the assured for some disease or ailment of importance and not for an indisposition of a day or two, trivial in its nature, and such as all persons are liable to and yet who are considered to be in sound health generally.<sup>1</sup>

§ 231. **Habits: Use of Intoxicants: Liquor, Opium, etc.** — Applications for life insurance generally contain questions bearing upon the habits of the applicant, especially in regard to the use of intoxicants, tobacco and opium. In whatever language these questions are couched the words are to be taken in their plain, ordinary meaning. As where the inquiry was whether the applicant was “sober and temperate” the court said:<sup>2</sup> “The words, sober and temperate, are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spiritous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract of insurance.”<sup>3</sup> “The questions as to health and habits in respect to intoxicating drinks will be taken to mean what the words employed by those questions usually and commonly mean. They are not words of art, but words of every-day meaning; and this is a contract not between professional men or lawyers, but a contract that these companies profess to make with the world, and when they ask a man if his health is good there is no mys-

<sup>1</sup> *Brown v. Metropolitan L. Ins. Co.* (Mich.), 32 N. W. Rep. 613; 8 West. Rep. 775.

<sup>2</sup> *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. Rep. 253.

<sup>3</sup> *John Hancock Mutual Life Ins. Co. v. Daly*, 65 Ind. 10.

tery in the question.”<sup>1</sup> In a case involving similar questions, decided by the Supreme Court of the United States,<sup>2</sup> afterwards approved by the same court,<sup>3</sup> the question was, “Is the party of temperate habits? Has he always been so?” and it was said: “When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency, from frequent repetitions of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising, for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured ‘in the usual, ordinary, and every-day routine of his life were temperate,’ the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional over-indulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit.” “An occasional excess in the use of intoxicating liquor,” says the Supreme Court of Ohio,<sup>4</sup> “does not, it is true, constitute a habit, or make a man intemperate, within the meaning of this policy; but if the habit has been formed and is indulged in, of drinking to excess and becoming intoxicated, whether daily and continuously, or periodically, with sober intervals of greater or less length, the person addicted to such a habit cannot be said to be of

<sup>1</sup> *Swick v. Home Life Ins. Co.*, 2 Dill. C. C. 160.

<sup>2</sup> *Insurance Co. v. Foley*, 105 U. S. 350.

<sup>3</sup> *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 501.

<sup>4</sup> *Union Mutual Life Ins. Co. v. Reif*, 36 Ohio St. 599; 38 Am. Rep.

temperate habits, within the meaning of this policy. \* \* \* The habit of using intoxicating liquors to excess is the result of indulging a natural or acquired habit, by continued use, until it becomes a customary practice. This habit may manifest itself in practice by daily or periodical intoxication or drunkenness. Within the purview of these questions it must have existed at some previous time, or at the date of the application, but it is not essential to its existence that it should be continuously practiced, or that the insured should be daily and habitually under the influence of liquor. Where the general habits of a man are either abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits. But if the habit is formed of drinking to excess, and the appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are temperate, though he may be duly sober for longer or shorter periods in the intervals between the times of his debauches." In *Van Valkenburgh v. American Popular Life Ins. Co.*,<sup>1</sup> the question was: "Does the insured use any intoxicating liquors or substances?" And the court held that this question did not direct the mind to a single or incidental use, but to a customary or habitual use.<sup>2</sup> False representations made by the insured concerning his habits as to temperance avoided the policy even though they were made in good faith without intent to deceive.<sup>3</sup> The use of intoxicating liquors and drunkenness are pernicious habits tending to shorten life.<sup>4</sup> It is for the jury to weigh all the circumstances and to determine, in view of them all, whether the applicant was habitually intemperate,

<sup>1</sup> 70 N. Y. 605; 9 Hun, 583.

<sup>2</sup> *Tatum v. State*, 63 Ala. 147; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

<sup>3</sup> *Hartwell v. Alabama Gold L. Ins. Co.*, 33 La. Ann. 1353.

<sup>4</sup> *Schultz v. Mutual Life Ins. Co.*, 6 Fed. Rep. 672; *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118.

or used liquors to excess, or otherwise answered the questions falsely.<sup>1</sup> Habits of intemperance acquired subsequent to the insurance, even though the cause of death, will not avoid the policy, unless expressly so stipulated.<sup>2</sup>

§ 232. **Good Health.** — In one of the earliest cases relating to life insurance,<sup>3</sup> Lord Mansfield said that a warranty of good health meant simply that the applicant was in a reasonably good state of health, and was such a life as ought to be insured on common terms. That it did not mean that he was free from every infirmity, and, in fact, though he had one, the life might be a good one, and the fact that the insured had several years before received a wound in the loins, which so affected him that he could not retain his urine or fæces, though not mentioned, was not inconsistent with a good insurable life. Afterwards the same eminent jurist said,<sup>4</sup> in a case where it appeared that the insured was at times troubled with spasms from violent fits of the gout, though at the time of insurance in his usual state of health: “The imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject-matter. By the present policy the life is warranted in health; to others, in good health. And yet there is no difference in point of fact. Such a warranty can never mean that a man has not in him the seeds of some disorder. We are all born with the seeds of mortality in us. A man subject to the gout is a life capable of being insured, if he has no sickness at the time to make it an unequal contract.”<sup>5</sup> “The word ‘health’ as ordinarily used,” says the New

<sup>1</sup> *N. W. Ins. Co. v. Muskegon Bank*, 122 U. S. 501.

<sup>2</sup> *Reichard v. Manhattan Life Ins. Co.*, 31 Mo. 518; *Horton v. Equitable Life A. Soc. (C. C. P. N. Y.)*, 2 Big. Life & Acc. Ins. Cas. 108.

<sup>3</sup> *Ross v. Bradshaw*, 1 W. Bl. 312, A. D. 1760.

<sup>4</sup> *Willis v. Poole*, 2 Parke on Ins. 650.

<sup>5</sup> *Watson v. Mainwaring*, 4 Taunt. 763.

York Court of Appeals,<sup>1</sup> “is a relative term. It has reference to the condition of the body. Thus, it is frequently characterized as perfect, as good, as indifferent and as bad. The epithet ‘good’ is comparative. It does not require absolute perfection. When, therefore, one is described as being in good health, that does not necessarily nor ordinarily mean that he is absolutely free from all and every ill ‘which flesh is heir to.’ If the phrase should be so interpreted as to require entire exemption from physical ills, the number to which it would be strictly applicable would be very inconsiderable.”<sup>2</sup> Another authority<sup>3</sup> states: “The term, good health, as here used, is to be considered in its ordinary sense, and means that ‘the applicant was free from any apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested.’”<sup>4</sup> Slight, unfrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health as that term was here employed.”<sup>5</sup> When a third person is asked if the applicant is now in good health, it does not mean whether he is actually free from illness or disease, but simply that he has indicated in his actions and appearance no symptoms or traces of disease, and to the ordinary observation of a friend or relative is in truth well.<sup>6</sup> A representation that the applicant had a florid appearance, when, in fact, he was pale and emaciated, will not, of itself, avoid a life policy of insurance, such appearance being no certain indication of disease or feebleness, and would

<sup>1</sup> *Peacock v. New York Life Ins. Co.*, 20 N. Y. 296, affirming 1 Bosw. 338.

<sup>2</sup> *Morrison v. Odd-fellows' Mut. L. Ins. Co.*, 59 Wis. 170.

<sup>3</sup> *Goucher v. Northwestern Traveling Men's Assn.*, 20 Fed. Rep. 598 and note.

<sup>4</sup> *Conver v. Phoenix Ins. Co.*, 3 Dill. 226.

<sup>5</sup> *Brown v. Metropolitan Life Ins. Co. (Mich.)*, 32 N. W. Rep. 612; 8 West. Rep. 775.

<sup>6</sup> *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274.

not necessarily cause the insurer to refuse the risk.<sup>1</sup> But equivocation in the answers touching health or anything which amounts to concealment is fatal.<sup>2</sup>

§ 233. **Latent Diseases Unknown to Applicant.** — If a representation of the applicant is that he is of sound body, and it be untrue: if it is made in good faith, without suspicion that he was of unsound body, though it afterwards be shown that he had then a fatal internal disease which caused his death, the policy will not be avoided.<sup>3</sup> But, where the applicant was asked if he had disease of the heart and he answered no, it was held, the answers being warranties, that the policy was void if the assured died of heart disease soon afterwards, although he could not have known that he had the disease.<sup>4</sup> In a case in Indiana,<sup>5</sup> the court below instructed the jury, the answers in the application of the insured being warranties, that if the assured had, at the time of making his application, some affection or ailment, of some one or more of the organs inquired about in the application, which ailment was of a character so well defined and marked as materially to derange, for a time, the functions of such organ, such ailment, whether known to the assured or not, would avoid the policy, and that “this would be so with reference to Bright’s disease of the kidneys, if it was such a disease as I have just mentioned.”<sup>6</sup> This view seems to be reasonable as well as consistent with

<sup>1</sup> *Illinois Masons’ Benev. Soc. v. Winthrop*, 85 Ill. 537.

<sup>2</sup> *Smith v. Aetna Life Ins. Co.*, 49 N. Y. 211; *Goucher v. N. W. Traveling Men’s Assn.*, 20 Fed. Rep. 598; *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24; *ante*, § 203.

<sup>3</sup> *Schwarzbach v. Ohio Valley P. Union*, 25 W. Va. 622; *Moulor v. Am. Life Ins. Co.*, 111 U. S. 335; *Life Assn., etc., v. Foster*, 11 Sc. Sess. Cas. (3d series) 351; *Thompson v. Weems*, L. R. 9 App. Cas. 671; *ante*, § 214.

<sup>4</sup> *Powers v. Northeastern Mut. L. Assn.*, 50 Vt. 630.

<sup>5</sup> *Continental L. Ins. Co. v. Young*, 15 N. E. Rep. 220; 12 West. Rep. 715.

<sup>6</sup> *Conn. Mut. L. Insurance Co. v. Union Trust Co.*, 112 U. S. 250; *Cushman v. U. S. Ins. Co.*, 70 N. Y. 72.

authority. The rule, therefore, is that, where the answers to questions in the application are representations, the death of the applicant from a latent disease, which existed at the time of the application, but unknown to the applicant, he answering all questions in good faith, will not avoid the policy. But, where the answers are warranties, then the death of the applicant from a latent disease, which existed at the time when he warranted himself to be free from it, will avoid the policy.

§ 234. **Disease.** — Before any temporary ailment can be called a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health and the continuance of life, or such as, according to common understanding, would be called a disease, and such has been the uniform opinion of text-writers and courts.<sup>1</sup> So, a cold is not a disease,<sup>2</sup> though accompanied with more or less congestion of the lungs, and though most, if not all persons, will have at times congestion of the liver, causing slight functional derangement and temporary illness, yet in the contemplation of parties entering into contracts of life insurance, and having regard to general health and the continuance of life, it may be safely said that there is in such cases no disease of the liver.<sup>3</sup> A severe sickness or disease does not include the ordinary diseases of the country, which yield readily to medical treatment and when ended leave no

<sup>1</sup> *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72; *N. W. Mut. L. Ins. Co. v. Heimann*, 93 Ind. 24; 2 *Park on Ins.* 933-935; *Chattock v. Shawe*, 1 M. & R. 498; *Fowkes v. The M. & L. Life Ins. Co.*, 3 Fost. & F. 440; *Bartean v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 595; 1 Hun, 430; 67 Barb. 354; 3 T. & C. 576; *Peacock v. N. Y. Life Ins. Co.*, 20 N. Y. 293; *Higbie v. Guardian Mut. L. Ins. Co.*, 53 N. Y. 603; *Fitch v. Am. Popular L. Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

<sup>2</sup> *Metropolitan Life Ins. Co. v. McTague* 49 N. J. L. 587; 9 Atl. Rep. 766; 8 Cent. Rep. 611.

<sup>3</sup> *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 72; *Goucher v. Northwest Traveling Men's Assn.*, 20 Fed. Rep. 600; *N. W. Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.



permanent injury to the physical system, but refers to those severe attacks which often leave a permanent injury and tend to shorten life.<sup>1</sup> When the applicant says that he has never had any "serious illness" the courts will construe the meaning to be that he has never been so seriously ill as to permanently impair his constitution and render the risk unusually hazardous.<sup>2</sup> Clearly the term "severe" or "serious" illness does not mean slight, temporary physical disturbances or ailments, speedily and entirely recovered from, not interfering materially with the pursuit of one's avocation, producing no permanent effect on the constitution and not rendering the insurance risk more than usually hazardous.<sup>3</sup> If necessary, the court will admit evidence to explain what is meant by the term used, as, for instance, to show that the medical term, "spitting of blood," means spitting of blood from the lungs exclusively,<sup>4</sup> or that gastritis and chronic gastritis are not the same, or that sub-acute rheumatism is not the disease of rheumatism.<sup>5</sup> The court will not hold as a matter of law that either pneumonia or sunstroke is a severe sickness or disease, but will leave the question to the jury,<sup>6</sup> nor will it say that the omission to mention a temporary injury to the eye, by sand having been thrown into it, which had produced an inflammation six years before the policy was applied for, and which was then cured, is conclusive evidence of fraud, or a breach of

<sup>1</sup> *Holloman v. The Life Ins. Co.*, 1 Woods C. C. 674.

<sup>2</sup> *Ill. Masons Benev. Soc. v. Winthrop*, 85 Ill. 542; *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670.

<sup>3</sup> *Goucher v. N. W. Traveling Men's Assn.*, 20 Fed. Rep. 600; *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Chattock v. Shawe*, 1 M. & Rob. 498; *Fowkes v. Manchester & L., etc., Ins. Co.*, 3 F. & F. 440; *Watson v. Mainwaring*, 4 Taunt. 763; *Union Cent. Life Ins. Co. v. Cheever*, 11 Ins. L. J. 264 (affd. Sup. Ct. Ohio).

<sup>4</sup> *Singleton v. St. Louis Ins. Co.*, 66 Mo. 63; 27 Am. Rep. 321.

<sup>5</sup> *Price v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 518; 10 Am. Rep. 166.

<sup>6</sup> *Boos v. World Mut. Life Ins. Co.*, 64 N. Y. 236; *Knickerbocker L. Ins. Co. v. Trefz*, 104 U. S. 197.

the warranty.<sup>1</sup> Nor that "chronic pharyngitis" is a "sickness" in contemplation of the parties putting the question.<sup>2</sup> By all of the foregoing cases the doctrine is established that it will be left, ordinarily, to the jury to say whether the applicant has answered the questions correctly. In a leading case<sup>3</sup> the court says: "It was for the jury to decide whether 'chronic bronchitis' or 'bronchial difficulty,' or any other bodily affection or condition to which the assured was found by them to be subject, amounted to bronchitis, consumption, disease of the lungs, or some other of the infirmities stated in the application, and relied on by the defendants; and whether the spitting of blood by him, if proved to have taken place, was under such circumstances as to indicate disease in his throat, lungs, air passages, or other internal organs." In England it has been held that the applicant is bound to state to the company a single instance of spitting of blood, although the same court said that the expression "has not had any spitting of blood" does not mean that he had never spit blood, but never from unascertained causes or disease tending to shorten life.<sup>4</sup>

§ 235. **Accident or Serious Injury.** — In a case arising in Iowa the defense was that the applicant had not correctly answered the question whether the party had ever met with "any accidental or serious injury," and the answers being warranted true the policy was thereby avoided. The opinion of the Supreme Court of that State says:<sup>5</sup> "The defendant claims that if the insured 'ever met with any \* \* \*

<sup>1</sup> *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557; 17 Am. Rep. 372.

<sup>2</sup> *Mutual Ben. L. Ins. Co. v. Wise*, 34 Md. 599.

<sup>3</sup> *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381; 1 Big. L. & A. Ins. Cas. 229.

<sup>4</sup> *Geach v. Ingall*, 14 M. & W. 95; 15 L. J. Ex. 37; 9 Jur. 691.

<sup>5</sup> *Wilkenson v. Conn. Mut. Life Ins. Co.*, 30 Ia. 127.

accidental injury,' that will bar a recovery because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm, in infancy; to a cut upon the thumb or finger, in youth; to a stumble and falling, or the sprain of a joint, in a more advanced age. The idea is, that such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction or hypercriticism of the language, which would make the word 'any' an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the courts, the law, the defendant itself and its business." Upon the same subject the Supreme Court of the United States says: <sup>1</sup> "It is insisted by counsel for the defendant that if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years, and if the failure to mention all such injuries must invalidate the policy, very few would be sustained

<sup>1</sup> Insurance Co. v. Wilkenson, 13 Wall. 222.

where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy? On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the inquiry with reference to its influence on the insurable character of the life proposed. Looking, then, to the purpose for which the information is sought by the question and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them." A fracture of the skull, whether it affected the health or not, is such a serious and unusual an injury, that it must be disclosed.<sup>1</sup> So, where a blow on the throat had caused an abrasion of the windpipe and the raising of a little blood and a confinement to the bed for three days and the attendance of a physician, it was held<sup>2</sup> that the evidence was sufficient to sustain a finding that the party had received a wound, hurt or serious

<sup>1</sup> *Moore v. Conn. Mut. L. Ins. Co.*, 41 Up. Can. Q. B. 497; on appeal, 3 Ont. App. 230, the court were equally divided.

<sup>2</sup> *Bancroft v. Home Benefit Assn.*, 8 N. Y. St. Rep. (Superior Ct.) 129.

bodily injury. In a case in Pennsylvania,<sup>1</sup> where the questions and answers were these: "4. Have you been subject to or had any of the following disorders or diseases \* \* \* Open sores, lumps, or swelling of any kind? Ans. Nothing of that kind to my knowledge. 9. Have you ever had any malformation, illness or injury, or undergone any surgical operation? Ans. No." The court said: "These questions, it must be admitted, are in the most general terms, and if they are to be so read and understood, they are not only unreasonable but absurd. A slight cutting of the finger, with a pen knife, may for a time produce both an open sore and a swelling; the mere indisposition arising from cold is an illness; the stubbing of a toe is an injury; and the most trivial operations with hand or knife may be said to be surgical. It would be impossible for a person of mature years to remember, and absurd for the association to inquire as to the common and trivial ailments or injuries he may have suffered from his earliest childhood, and it is unreasonable to suppose that these were in contemplation of the parties. The form of the fourth question indicates, however, that the open sore or swelling intended, is such as results from 'disease or disorder,' that is to say, such as result by defective action, from some functional derangement, and not from wounds or accidental injuries, and the court was right, we think, in saying that they were to some extent permanent or continuous, connected or recurrent. So, the illness or injury referred to, must be of such nature and importance as would reasonably fall within the line of inquiry proper to be pursued in such cases. We do not say that the illness or injury must be such as would be material to the risk, but such as in the judgment of the jury was reasonably in contemplation of the parties, in view of

<sup>1</sup> Home, etc., Life Association v. Gillespie, 110 Pa. St. 88; 1 Atl. Rep. 340; 1 Cent. Rep. 134.

the nature of the matter under consideration. If the line of distinction is obscure; and difficult to draw, the fault is with the association for making it so. We do not believe that the assured was expected or required to remember and to recite in his application all of the trivial ailments of his life."

## CHAPTER VII.

### DESIGNATION OF BENEFICIARY: INSURABLE INTEREST.

- § 236. Benefit of Beneficiary Association is paid to a Person Designated by the Member, or by the Laws of the Society.
- 237. Member has no Property in Benefit but only Power to Designate Beneficiary.
- 238. This Power may be General or Special.
- 239. Execution of Power must be in Compliance with Terms of Instrument Creating it.
- 240. Equity sometimes Aids Defective Execution.
- 241. Consequences of Failure to Execute Power.
- 242. Designation of Beneficiary sometimes Condition Precedent of Society's Liability.
- 243. When Designation of Beneficiary Lapses.
- 244. Limitations on Power, Restricting the Designation to Certain Classes.
- 245. The same Subject: A more Liberal View.
- 246. Unless Contract or Statute Forbids, Choice of Beneficiary is Unlimited.
- 247. Liberal Construction of Charter and By-laws: *Lex Loci*.
- 248. Insurable Interest.
- 249. The same Subject: Wagering Policies.
- 250. The same Subject: Relatives; Creditors.
- 251. General Rule.
- 252. The Doctrine of Insurable Interest Applied to Contracts of Benefit Societies.
- 253. Policy or Designation of Beneficiary Valid in its Inception Remains so.
- 254. Lawfulness of Designation of Beneficiary a Question of Construction.
- 255. Rules of Construction in Cases of Designation of Beneficiary.
- 256. Family.
- 257. Children.
- 258. Orphans.
- 259. Widow.
- 260. Heirs.
- 260a. Relatives.
- 261. Dependents.
- 262. Legal Representatives: Devisee: Legatee.

263. Ambiguous Designation: "Estate."

264. Several Beneficiaries. Construction.

265. Incorporated and Unincorporated Benefit Societies: *Ultra Vires*.

**§ 236. Benefit of Beneficiary Association is Paid to a Person Designated by the Member, or by the Laws of the Society.** — Nearly all benefit societies have for their principal object the payment of a stated sum of money upon the death of a member to his properly designated beneficiary, or, in default of such designation, then to his widow, children or heirs, as provided in the charter or by-laws of the society. Under some circumstances, if no designation is made as required by the fundamental law of the organization, the benefit may revert to the society. The authorities agree that the contract entered into by a benefit society with its members is executory in its nature and is contained in the certificate, if any be issued, taken in connection with the charter, or constitution and by-laws of the organization, and the statutes of the State under which it is formed. To the terms of this contract the member is conclusively presumed to have assented when he became such.<sup>1</sup>

**§ 237. Member has no Property in Benefit, but only Power to Designate Beneficiary.** — The member of the society as such has, under this contract, no interest nor property in this benefit, but simply the power to appoint some one to receive it. By the definition usually given a power is technically "an authority by which one person

<sup>1</sup> *Hellenberg v. District No. 1, etc.*, 94 N. Y. 580; *Maryland Mutual B. Assn. v. Clendinen*, 44 Md. 429; *Arthur et al. v. Odd-fellows' Ben. Assn.*, 29 Ohio St. 557; *Relief Assn. v. McAuley*, 2 Mackey, 70; *Barton v. Provident Relief Assn.*, 63 N. H. 535; *Richmond v. Johnson*, 28 Minn. 447; *Greeno v. Greeno*, 23 Hun. 478; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189; 10 N. East. Rep. 79; 7 West. Rep. 527; *Van Bibber's Adm. v. Van Bibber*, 82 Ky. 347; *Worley v. Northwestern Masonic, etc.*, 10 Fed. Rep. 227; *Kentucky Masonic, etc., Ins. Co. v. Miller*, 13 Bush, 489; *Hammerstein v. Parsons*, 29 Mo. App. 509.



enables the other to do some act for him.<sup>1</sup>” That a member of a benefit society has only this power, and nothing else, was decided in an early case in which the right was fully discussed.<sup>2</sup> In that case a power was defined to be “a liberty or authority reserved by, or limited to, a party to dispose of real or personal property for his own benefit, or for the benefit of others, and operating upon an estate or interest, vested either in himself or in some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it either wholly or partially.”<sup>3</sup> It has been said: “That a person having a power over property has not in strictness any interest in, or right or title to, the property to which the power relates, appears in early authorities.”<sup>4</sup> This definition is not strictly accurate when applied to the powers possessed by members of benefit societies, yet probably is sufficiently so for all practical purposes. This right of designation is a naked power because it is a right or authority disconnected from any interest of the donee in the subject-matter, and is governed generally by the rules applicable to that class of powers.<sup>5</sup> In the very first cases relating to benefit societies this principle was clearly recognized. In 1876 the Supreme Court of Ohio<sup>6</sup> construed the rights of the member in the benefit to be a power to appoint a beneficiary, and a similar case had been decided in the same way the year before by the Supreme Court of Maryland.<sup>7</sup> In this case the residuary legatees under the will of a deceased member, who left no wife nor children, sued to recover the benefit. This benefit was not specifically mentioned in the

<sup>1</sup> Bouv. Law Dic. tit., Power; 2 Lilly Abr. 339.

<sup>2</sup> Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 433.

<sup>3</sup> But. Note 1, Co. Litt. 342b.

<sup>4</sup> Albany's Case, 1 Rep. 110b; Lampet's Case, 10 Rep. 48b; Co. Litt. 265b.

<sup>5</sup> Bloomer v. Waldron, 3 Hill, 365.

<sup>6</sup> Arthur et al. v. Odd-fellows' Ben. Assn., 29 Ohio St. 557.

<sup>7</sup> Maryland Mut. Ben. Soc. v. Clendinen, 44 Md. 429; 22 Am. Rep. 53.

will. The charter of the defendant provided that the fund should be paid upon the death of a member "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment." If there were none of these parties, and no disposition by will or assignment, then, after payment of funeral expenses, the balance was to revert to the society. The court said: "The interest acquired by a member of this association is not one payable to himself, or for his own benefit, further than his funeral expenses. It is not a '*debitum in præsentī, solvendum in futuro*;' if the deceased had only a power, and not an interest or property in the sum or fund, it was not assets. In 2 Chance on Powers,<sup>1</sup> it is said: 'That an ordinary power is not in itself assets, is clear from all the cases.' This cannot be classed among the assets to be returned by an administrator in his inventory; it is not a chose in action or any species of personal property. We know of no case in which the *jus disponendi* authorized by charter, under provisions like the present, has been declared a mere power; but powers arise at common law, under bonds to convey estates as another shall appoint, or pay sums of money as another shall appoint, either generally, or among children, or under covenants for like purposes.<sup>2</sup> We cannot see why an authority or privilege acquired under a charter, to be exercised for the benefit of another should not be governed by the same rules." And the benefit reverted to the society as there was no disposition by will or assignment according to the terms of the contract. A similar case afterwards arose in New York. In this case the charter provided that the fund should be "paid to the wife of the deceased, if living, and if dead to his children, and, if there are none, then to such person as he may

<sup>1</sup> § 1820.

<sup>2</sup> 3 Atk. 656; 1 Vesey sr. 86; Cro. Car. 219, 376, and other cases cited in 1 Chance on Powers.

formally have designated to his lodge prior to his decease.” The deceased had no wife nor children and so formally designated his mother, who died before him. He afterwards, and before his mother’s death, made a will in which the benefit was given to his mother, or in case of her prior decease, then to his brother. The suit was brought by the executor under this will against the society and, in affirming the judgment of the lower court for the defendant, the Court of Appeals said:<sup>1</sup> “The charter and by-laws of the defendant corporation” constituted the terms of an executory contract to which the testator assented when he accepted admission into the order. The testator agreed on his part to pay certain dues and assessments as specified and the corporation agreed upon the death of the testator to pay \$1,000 to his wife, if living; if dead, to his children; and if there should be neither wife nor children, then to ‘such person or persons as he may have formally designated to his lodge prior to his decease;’ such sum to be collected for that purpose by assessments. The corporation contracted to pay to no one else, and were not bound to pay at all except ‘to the person or persons’ described in the agreement, and out of such collected assessments. Lowenstein, the plaintiff’s testator, did so designate to his lodge, prior to his decease, his mother, Rika Lowenstein. He had neither wife nor children, and so was at liberty to select and name the beneficiary. The designation which he thus made describes the payment directed as ‘the \$1,000 my heirs are to receive’ of the corporation. This language was purely matter of description, intended to identify the fund, and will not at all bear the interpretation sought to be put upon it of a designation of his ‘heirs’ as the recipients. On the contrary, the paper itself excluded any such interpretation, for its very purpose was to name and designate the particular recipient, irrespective of the ques-

<sup>1</sup> *Hellenberg v. Dist. No. 1., I. O. B. B.*, 94 N. Y. 580.

tion whether she should prove to be one of his heirs or not. If his mother had been living at his death she would have been entitled to the endowment because specifically named, and not by virtue of any relationship to the testator. The mother thus named had no interest in or title to the money to be paid while she was living. The testator could at any time have gone to his lodge and designated upon the books some other recipient, thus revoking his previous designation. The mother could not become entitled to the endowment at all unless she survived the testator, and her designation remained unrevoked. Nor did the testator have any interest in the future fund. He had simply a power of appointment, authority to designate the ultimate beneficiary, and that power and authority died with him, because it could only be exercised by him, and prior to his decease. If he did not so exercise it, nobody surviving or representing him could, and upon his death he could have nothing which would descend or upon which a will could operate. His contract effected that result. He agreed that the endowment to be collected should be paid not to his next of kin, not to the legatee named in his will, but to the person designated to his lodge, or in default of such person so named then to nobody.”<sup>1</sup> All of the authorities agree that the rights of the members of benefit societies in the sums agreed to be paid at death is simply the power to appoint the beneficiary and that the constitution, or charter, and the by-laws are the foundation and source of such power.<sup>2</sup> The cases must not, however, be understood

<sup>1</sup> *Bishop v. Empire Order Mut. Aid*, 43 Hun, 472.

<sup>2</sup> *Greeno v. Greeno*, 23 Hun, 479; *Barton v. Provident Mut. Relief Assn.*, 63 N. H. 535; 1 N. Eng. Rep. 856; *Eastman v. Provident Mut. R. Assn. (N. H.)*, 20 C. L. J. 266; *Worley v. N. W. Mass. Aid Assn.*, 10 Fed. Rep. 227; *Gentry v. Sup. Lodge K. of H.*, 23 Fed. Rep. 718; *Swift v. Ry. Cond. Mut. Assn.*, 96 Ill. 309; *Masonic Mut. R. Assn. v. McAuley*, 2 Mackey, 70; *Presb. Ass. Fund v. Allen*, 106 Ind. 593; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189; 10 N. East. Rep. 79; 7 West. Rep. 527; *Richmond v. Johnson*, 28 Minn. 447; *Ky. Masonic Mut.*

to hold that the member of a benefit society has not a property right in the contract of membership, under which he has the power to designate a recipient of the benefit to be paid, because of such membership and under the contract. The right of the member in this contract is a valuable one, which the courts will at all times recognize and protect, although, strictly speaking, such member has no property interest in the benefit paid, or subject of the power. The membership, which includes the right to pay the agreed consideration and to appoint a person to take the benefit, must be regarded as a species of property and is to be distinguished from the benefit, or sum to be paid, itself, in which the member has no property.

§ 238. **This Power may be General or Special.** — The power of a member to appoint a beneficiary may be general, if by the contract he is at liberty to appoint to whom he pleases, or special if he is restricted to an appointment to or among particular classes only.<sup>1</sup> And we shall see as we pro-farther, the power, in nearly every instance, is special, because the appointment is limited to persons of a specified class.

§ 239. **Execution of Power Must be in Compliance With Terms of Instrument Creating It.** — It follows, from the preceding citations, and also from general principles,<sup>2</sup> that the execution of the power, to be valid, must be in precise compliance with the terms of the contract creating such power.<sup>3</sup> As Sugden<sup>4</sup> says: “Where forms are imposed on

*Life Ins. Co. v. Miller*, 13 Bush, 489; *Van Bibber's Admr. v. Van Bibber*, 82 Ky. 347; *Sup. Counc. Catholic M. B. A. v. Priest et al.*, 46 Mich. 429; *Durian v. Central Verein*, 7 Daly, 168; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Arthur v. Odd-fellows' B. Ass.*, 29 Ohio St. 557; *Duvall v. Goodson*, 79 Ky. 224.

<sup>1</sup> 2 Washb. on Real Prop. 307.

<sup>2</sup> 2 Washb. on Real Prop. 317; 1 Sugden on Powers, 250.

<sup>3</sup> *Elliott v. Whedbee*, 94 N. C. 115; *Sup. L. K. & L. of H. v. Grace*, 60 Tex. 571.

<sup>4</sup> 1 Sugden on Powers, 250.

the execution of a power it is either to protect the remainder-man from a charge in any other mode, or to preserve the person to whom it is given from a hasty and unadvised execution of the power. In each case the circumstances must be strictly complied with; in the first it would be in direct opposition to the agreement to consider the estate charged when the mode pointed out is not adhered to; in the second, to dispense with the solemnities and forms required to attend the execution of the power, is to deprive a man of the bridle which he has thought proper to impose on his weakness or frailty of mind, in order effectually to guard himself against fraud or imposition. Besides, the circumstances required to the execution of a power are perfectly arbitrary, and (except only as they are in fact required) unessential in point of effect to the validity of any instrument by which the power may be exercised." Consequently, a power to designate by deed, or written instrument in the nature of a deed, cannot be executed by will, or *vice versa*.<sup>1</sup> In executing this power, the instrument or will, if such disposition be allowed, should refer to it so as to show that the donee had in view the subject of the power at the time. The law itself prescribes no particular ceremonies to be observed in the execution of a power except those required for the execution of the instrument executing the power, as of a deed or will, in which case the requisite formalities of execution or attestation must be complied with. The contract creating the power governs in all respects its execution.<sup>2</sup> The benefit will not pass under the residuary clause of a will, nor by general disposition of all of the

<sup>1</sup> 2 Washb. on Real Prop. 317; 1 Sugden on Powers, 255; Worley v. N. W. Masonic Aid Ass., 10 Fed. Rep. 227; Daniels v. Pratt, 143 Mass. 216; 10 N. East. Rep. 166; 3 N. Eng. R. 480.

<sup>2</sup> 1 Sugden on Powers, 250, 255; 2 Washb. on Real Prop. 317; Presbyterian Ass. Fund v. Allen, 106 Ind. 593; 7 N. East. Rep. 317; 4 West Rep. 712; Am. Legion of Honor v. Perry, 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715.

testator's property,<sup>1</sup> unless some authority providing otherwise is found in the laws of the organization.<sup>2</sup> It has been held that defects or irregularities in the form or manner of designation may be waived by the lodge;<sup>3</sup> but this is against the weight of authority, which is in favor of the rule that the required formalities in the laws of the society relative to designation of beneficiary are part of the contract.<sup>4</sup>

§ 240. **Equity Sometimes Aids Defective Execution.** — Equity will sometimes interfere to remedy a defective execution of a power, but the case must be very clear and no opposing equity must exist.<sup>5</sup> It has been held<sup>6</sup> that a certificate in a benefit society may be reformed after the death of a member by inserting the name of the beneficiary when it appears that the secretary of the society and the member both understood that the name should be entered on the record without further direction. The Supreme Court of Michigan has said upon this subject:<sup>7</sup> "It is possible — and we need not consider under what circumstances — that when a member has executed and delivered to the reporter (secretary) his attested surrender in favor of a competent beneficiary, his death, before a new certificate is issued, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident."<sup>8</sup>

<sup>1</sup> *Arthur v. Odd-fellows' Assn.*, 29 Ohio St. 557; *Maryland Mut. Ben. Assn. v. Clendinen*, 44 Md. 429; 22 Am. Rep. 52; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Morey v. Michael*, 18 Md. 241; *Highland v. Highland*, 109 Ill. 366; *Greeno v. Greeno*, 23 Hun, 478; *Eastman v. Provident R. Soc. (N. H.)*, 20 Cent. L. J. 267; *contra*, *St. John's Mite Soc. v. Buckley (D. C.)*, 5 Mackey, 406; 6 Cent. R. 292; *Bown v. Catholic M. Ben. Assn.*, 33 Hun, 263; *Kepler v. Sup. L. Knights of Honor*, 45 Hun, 274.

<sup>2</sup> *Weil v. Trafford*, 3 Tenn. Ch. 108.

<sup>3</sup> *Kepler v. Sup. Lodge K. of H.*, 45 Hun, 274; *post*, § 308.

<sup>4</sup> See *post*, § 307.

<sup>5</sup> 1 Story Eq. Jur. 181, 182, *et seq.*

<sup>6</sup> *Scott v. Provident Mut. R. Assn.*, 63 N. H. 556; 2 N. Eng. Rep. 286.

<sup>7</sup> *Knights of Honor v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826.

<sup>8</sup> See *post*, § 284.

§ 241. **Consequences of Failure to Execute Power.**—The member of a benefit association having no interest nor property in the fund stipulated to be paid on his death to his appointee, but simply the power of appointment, failure to so appoint leaves the fund to be disposed of as provided for in the contract creating the power, and if no disposition is so provided for, then there is a total lapse of the power and the fund will revert to the society. In no case is this fund assets, and if collected by the executor or administrator it is to be regarded as a trust fund held for the benefit of the person entitled to it and the creditors cannot share in it. However the disposition of the benefit is determined by the charter and by-laws of the society and is to be ordered accordingly.<sup>1</sup> In a recent case,<sup>2</sup> which was an action brought by plaintiff as the administrator of one Gigar, to recover the benefit stipulated to be paid by the defendant society, the society was organized for the object of securing “to dependent and loved ones assistance and relief at the death of a member,” and by the by-laws, the benefit was payable “to such person or persons as he might by entry on the record book of the association or on the face of his certificate, direct the sum to be paid.” No person was designated by the deceased on the record book or the face of the certificate. The defendant society

<sup>1</sup> *Eastman v. Prov. Relief, etc., Soc.*, 20 C. L. J. 266; *Worley v. N. W. Mas. Aid, etc.*, 10 Fed. Rep. 227; *Daniels v. Pratt*, 143 Mass. 216; 10 N. East. Rep. 166; 3 N. Eng. Rep. 480; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Maryland, etc. v. Clendinen*, 44 Md. 429; *Greeno v. Greeno*, 23 Hun. 478; *Gould v. Emerson*, 99 Mass. 154; *Van Bibber's Admr. v. Van Bibber*, 82 Ky. 347; *Duvall v. Goodson*, 79 Ky. 224; *Masonic Rel. Assn. v. McAuley*, 2 Mackey. 70; *McClure v. Johnson*, 56 Ia. 620; *Ballou v. Gile, Admr.*, 50 Wis. 614; *American Legion of Honor v. Perry*, 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715; *Sup. Counc., etc., v. Priest*, 46 Mich. 429; 9 N. W. Rep. 481; *Whitehurst, Admr., v. Whitehurst (Va.)*, 1 S. E. Rep. 801; *Covenant Mut. Benefit Assn. v. Sears et al.*, 114 Ill. 108; *Swift v. San Francisco S. & E. Board*, 67 Cal. 567; *Fenn v. Lewis*, 10 Mo. App. 478.

<sup>2</sup> *Eastman v. Provident Mut. Rel. Assn.*, 20 C. L. J. 266.



offered to show by parol testimony that the deceased intended that the benefit should go to his affianced, and had often so declared. The Supreme Court of New Hampshire, in affirming judgment for the defendants, said: "The certificate was neither payable to the deceased, nor to his administrator, assigns, heirs, estate, or legal representatives. The defendant promised to pay the benefit to no one, save such person or persons as Gigar should direct by entry upon the certificate or record book of the association. By the contract he had the mere power of appointing the person who should receive the benefit. He was bound by the rules of the association, and could not change the beneficiary in a way not in conformity with them. We cannot know why he did not exercise his power of directing to whom the benefit should be paid. He may not have decided in his mind who should receive it. He may have intended that his associate members should not be called upon to contribute the sums required to fulfill his contract with the association. The only presumption is that he intended not to do what he omitted to do.<sup>1</sup> He had no personal interest in his membership and his personal representative, as such, can take no interest in it after his death. The benefit is not assets, for if the administrator can collect the money it must go primarily to Gigar's creditors. The charter, by-laws and certificate, all show that neither party had any such understanding. If Gigar had exercised the power of appointment, it is plain that the administrator could not maintain a suit to recover the money. How does Gigar's neglect to exercise it give him the power? There being no contract to pay to Gigar or to his legal representative, there is no breach. The plaintiff fails. In *Worley v. N. W. Masonic Aid, etc.*,<sup>2</sup> the facts are similar to those in this case and it

<sup>1</sup> *Worley v. N. W. Mas. Aid.*, Ass. 10 Fed. Rep. 227; 11 Ins. L. J. 141.

<sup>2</sup> *Supra.*

was held that the plaintiff, who was administrator of the assured, could not recover. *McClure, Exr. v. Johnson*,<sup>1</sup> decides that where a life policy, by its terms, is payable to a person other than the assured or his representatives, the payee cannot by will make a different disposition of the fund from that directed by the policy. Our conclusion is that the plaintiff cannot recover. The evidence offered as to Gigar's intention as to whom the money should be made payable, was inadmissible to vary the construction of the certificate, and was insufficient to constitute a trust."<sup>2</sup> The Court of Appeals of Kentucky, in passing upon a case involving the disposition of a benefit,<sup>3</sup> says: "A life policy for the benefit of the family of the person procuring, though not a testament, is in the nature of a testament, and in construing it the courts should treat it, as far as possible, as a will, as in so doing they will more nearly approximate the intention of the persons the destination of whose bounty is involved in such cases. As said in a former case, it is not to be supposed that a father, in procuring insurance on his own life for the benefit of his family, or in keeping such a policy alive, intends to benefit himself or his estate, and especially is that true when, by the terms of the charter of the company in which he insures, with which he must be supposed to be familiar, he cannot take insurance for the benefit of any one except his wife or children, if he have either, and cannot dispose of the insurance if he leave either wife or child surviving. We, therefore, conclude that the charter gave the member a mere power of appointment in case he has neither wife nor child, and that he has no interest whatever in the fund, and, therefore, it did not pass under a will merely disposing of all his estate, but in which no mention is made of the fund to

<sup>1</sup> 56 Ia. 620.

<sup>2</sup> *Wason v. Colburn*, 99 Mass. 342.

<sup>3</sup> *Duvall, etc., v. Goodson*, 79 Ky. 224.

arise from his membership.”<sup>1</sup> In a case decided by the Supreme Court of Illinois,<sup>2</sup> where the charter of defendant declared the objects of the association to be “to afford financial aid and assistance to the widows, orphans, heirs or devisees of deceased members,” and the certificate was payable to the members, “devisees, as provided in last will and testament, or in event of their prior death, to the legal heir or devisees of the certificate holder,” the member died intestate and the complainants, his only heirs, brought a bill to recover the benefit money. The court held that the clear intent was that the devisees, or the heirs—one or either of them should take. That if there were no devisees then to the heir.<sup>3</sup>

§ 242. **Designation of Beneficiary Sometimes Condition Precedent of Society's Liability.** — A case was recently decided by the Supreme Court of New York,<sup>4</sup> in which it was held that, under the laws of the society, the designation of a beneficiary on the part of the member was a condition precedent of its liability. In that case the charter of the society from the State provided that the object of the corporation should be, among other things, to “aid, assist and support members or their families in case of want, sickness or death.” The charter provided for a beneficiary fund, to be maintained by the order for this object, which should be under the control of the grand lodge and from which a specified sum should be paid over to the families, heirs or legal representatives of deceased or disabled members, or to such person or persons as such deceased member may, while living, have directed, and also that the manner and time of payment and the persons to whom payment was to be made should be regulated by the

<sup>1</sup> See *ante*, § 239.

<sup>2</sup> *Covenant Mutual Ben. Assn. v. Sears*, 114 Ill. 108.

<sup>3</sup> See also *Smith v. Covenant, etc., Assn.*, 24 Fed. Rep. 685.

<sup>4</sup> *Bishop v. Empire Order of Mutual Aid*, 43 Hun, 472.

rules and by-laws of said grand lodge. These rules provided for the issue of a certificate which, among other things, should set forth the name of the person to whom the benefit was payable. In this case no certificate was ever issued, but suit was brought against the order for the benefit and the court held the defendant not liable, saying: "The charter and by-laws, respecting the designation of the person to whom the beneficiary fund shall be made payable, were a part of the contract with the defendant, which the intestate entered into when he became a member, and as their provisions have not been complied with, the defendant is not liable." It held also, that "such designation is made the condition precedent of the defendant's liability."<sup>1</sup>

§ 243. **When designation of Beneficiary Lapses.** — In event of the death of the party designated in the lifetime of a member of the society, then there is also a failure of the exercise of the power, and, unless the contract provides otherwise, or there is another designation of a person entitled to take, the power lapses and the society takes by reversion. This rule has always been applied, one of the first precedents being the early case of *Oke v. Heath*,<sup>2</sup> where Lord Hardwicke held, the case being one where an appointee, by a will, died in the lifetime of the testator, who had power only to appoint by will, that by such death the appointment became void. The quaint language used will apply to the exercise of powers by members of benefit societies, which are as a rule revocable, for he says: "Then she, executing her power by will, it must be construed to all intents like a will; the conditions of which are, that it is ambulatory, revocable and incomplete till her death; nor can any one dying in the testator's life, take under it."

<sup>1</sup> See *Order Mut. Companions v. Griest* (Cal.), 18 Pac. Rep. 652.

<sup>2</sup> 1 Ves. sr. 139.

Other old cases are to the same effect.<sup>1</sup> Modern authority follows the older precedents.<sup>2</sup> It is but fair, however, to state that in a majority of these late authorities the reason of the decision has been, not the lapse of the designation, because it was ambulatory and liable to be revoked by the death of the appointee before that of the member, but a construction of the supposed intention of such member. One of the principal cases arose in the District of Columbia.<sup>3</sup> A member of the association designated his wife as the beneficiary of the fund; she died and he married again, but soon afterwards died, without changing his first appointment. The by-laws provided that on the death of a member the fund accruing because of the membership, should be paid to "his widow, orphan, heir, assignee or legatee;" the right of the member to designate the beneficiary was recognized and this designation could be changed with the consent of the board of directors. If the member died "without legal representatives" the fund went to the association. Upon the death of the member the fund was claimed by the administrators of the deceased wife, by the administrators of the husband and by the widow. The court in deciding the question said: "It will be sufficient to remark that in this case the question at issue is controlled by the particular language of the designation made by the husband. He had the power to designate the beneficiary, and he had a right to do so either absolutely or conditionally, and the direction given by him was that, in

<sup>1</sup> *Marlborough v. Godolphin*, 2 Ves. sr. 60; *Burges v. Mawbey*, 10 Ves. jr. 319.

<sup>2</sup> *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70; *Van Bibber's Admr. v. Van Bibber*, 82 Ky. 347; *Ballou v. Gile*, 50 Wis. 614; *Given v. Wisconsin Odd-fellows' Mut. L. Ins. Co. (Wis.)*, 37 N. W. Rep. 817; *Duvall v. Goodson*, 79 Ky. 224; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *American Legion of Honor v. Perry*, 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715; *Adams Policy Trusts*, 23 Ch. Div. 525; 52 L. J. Ch. 642; 48 L. T. 727; 31 W. R. 810.

<sup>3</sup> *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70.

event of his death, all benefits arising from his connection with the association should be paid to his wife. Ann Reed. Now, it is obvious that this direction cannot be literally gratified unless the wife survive the husband, and the whole language of the husband on this point is that of contingency or condition. He was looking forward to this provision for the benefit of his wife in case she should survive him—that is, in that contingency. His own death was not, of course, contingent; it was an event certain to occur; but it might be regarded as contingent with reference to some other event—the death of his wife for instance—and we think the fair interpretation of the language of the husband is that, in case of his dying *before his wife*, the benefits arising under this transaction were to enure to her, but not otherwise. To construe it otherwise would be to hold that the design of the husband in making this provision was that its benefits should go first, to the wife, if she survived, but otherwise to her relations; and it is not to be supposed that this association was organized and sustained by its members for the purpose of benefiting the relations of their widows. We think, therefore, the meaning of the language used by the husband in designating the beneficiary was that the benefits of this provision were to go to his wife only in case she survived him; and as she did not survive her husband, the provision falls to the ground so far as she is concerned, and the claims of her representatives are out of the question. The controversy remains then between the personal representatives or administrators of the husband and the surviving widow. In behalf of the former, the same general ground already stated is taken, namely, that this is virtually an insurance on the husband's life, and as such would pass to his estate. In some respects it is like a life insurance and in other respects it is different. It was not designed to provide for creditors of the husband or for those generally interested in his estate; but for his widow,

orphans or immediate heirs; and therefore the charter provides for 'the immediate payment to the widow, orphans, heir, assignee or legatee of a deceased member, of as many dollars as there are members in good standing on the books of the corporation.' The charter and the by-laws control the destination of this fund, and they explicitly provide that in the condition of affairs which this case presents, the widow, orphans, heir, assignee or legatee shall be entitled to receive it. An argument is based on the language of article V, section 5 (of the charter) which provides that where the deceased member has no *legal representative*, the money shall become the property of the association. From this provision it is argued that if there are legal representatives of the deceased, they must be entitled to the fund. This argument, if it proved anything would prove too much. It would prove that in a case where there were no legal representatives, notwithstanding the existence of a widow, or an orphan, or heir, the money must go back into the general fund of the association to the direct frustration of the whole scheme and object of the association and in disregard of the express language of its charter and by-laws. We think, therefore, that the term, 'legal representatives,' here means those who are the legal representatives *in the contemplation of this charter and by-laws*, namely the very people who are there enumerated, 'the widow, orphans, heir, or legatee.' The fund is to go to some one of these parties. They are mentioned disjunctively: the money is to be paid to the widow, *or* the orphans, *or* the heir, *or* the assignee or legatee. Now, that means one of two things, either that it shall go to some one of these to be selected by some authority, or else that they are to have precedence in the order in which they are named. But there is no authority provided for or indicated in either the charter or the by-laws by whom any one of these beneficiaries shall be selected; and, therefore, our

conclusion is, that the order in which they are named is the order in which they are to benefit by this fund; first, the widow; if there is no widow, then the orphans; if there is no orphan, then the heir, etc. In this case the question is between the widow and the personal representatives. The latter are excluded entirely by our construction of the by-laws, and, therefore, the decree will be that the widow shall take the fund.” It has been held that where, by the laws of the society and the State, the payment of benefits is confined to the heirs of the member, or members of his family, and the member designated his wife, and she afterwards became divorced from him, that the appointment was thereby revoked.<sup>1</sup> The same court has also held that where the member designated his mother, and she was a person whom he could lawfully so designate, as his beneficiary, this appointment was not revoked by his subsequent marriage.<sup>2</sup> Although in the cases just cited the courts have been controlled by the supposed intent of the member, the same conclusions would have been reached had the rules generally governing the execution of powers been followed. As the death of the appointee, under a power executed by will, during the life of the testator, causes the appointment to fall, so where a member of a benefit society designates a beneficiary who dies during the lifetime of the member, the designation is revoked, or lapses, and it has been held that if the designated beneficiary dies, after the designation but before the issuance of a certificate and in the lifetime of the member the designation fails.<sup>3</sup>

**§ 244. Limitations upon Power: Restricting the Designation to Certain Classes.** — In nearly all benefit societies

<sup>1</sup> *Tyler v. Odd-fellows' Mut. R. Assn.*, 145 Mass. 134; 13 N. East. Rep. 360; 5 N. Eng. Rep. 191.

<sup>2</sup> *Catholic Order of Foresters v. Callahan (Mass.)*, 16 N. East. Rep. 14; 6 N. Eng. Rep. 95. See also *Grand Lodge, etc., v. Child*, 14 West. Rep. 454; 38 N. W. Rep. 1.

<sup>3</sup> *Order Mut. Companions v. Griest (Cal.)*, 18 Pac. Rep. 652.



limitations are placed by the charter and by-laws, or by statute, upon the power of the members to designate the beneficiaries of the money to be paid under the contract. Where the power is special it must be exercised within the restrictions imposed by the terms of its creation which, in the case of the associations under consideration, are contained in the charter and by-laws as modified by statute. A case was decided in Kentucky where the society was organized under special charter, which provided among other things for the creation of a fund by assessments upon the members; this fund was declared to be "for the benefit of the widows and children of the deceased members, and the balance to defray the expenses of the company," and further: "The fund created for the benefit of the widow and children of the deceased member, shall be paid to them by said company. \* \* \* Or if he should leave no widow or child, then to be appropriated according to his will; or if he makes no will, and leaves no widow and child it shall vest and remain in the company." The certificate issued to Miller, the member, obligated the company to pay to "his heirs or as he may direct in his will." Miller died intestate leaving no child but a widow, whose committee in lunacy sued for the money. The fund was also claimed by Miller's administrator. The Court of Appeals, in passing on the case,<sup>1</sup> says: "We need not stop to inquire what may be the extent of the power of the company to make contracts, nor whether a covenant with the ancestor to pay to the heir after his death will pass to the personal representative of the ancestor, or to the heir for whose benefit the covenant was made, because we are of the opinion that whatever might be the answers to those inquiries, they could have no influence on the decision of this case. The charter prescribes who may become members of the society, and their obligations, and who shall be

<sup>1</sup> Kentucky Masonic Mut. Ins. Co. v. Miller's Admr., 13 Bush. 489.

the beneficiaries of the membership after the death of the member, and it is not in the power of the company or of the member or of both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent therein indicated. The company and Miller could decide the question whether he should become a member, and having done so, from that moment the rights of the beneficiaries attached, subject to be defeated by his failure to comply with the terms of his membership, but subject to no other contingency whatever. If therefore the stipulation to pay to Miller's heirs should be construed to have been intended to secure the fund, payable on account of his membership, to his administrator, or his creditors, such stipulation could not prevail over the unequivocal provisions of the charter, that it shall be paid to his widow and children." In Massachusetts, Missouri, Ohio and other States, statutes have been enacted limiting the beneficiaries of members of benefit associations to certain classes of persons. It is not necessary at this place to refer more particularly to the statutes, but they generally provide that benevolent and charitable associations may become incorporated and in their laws provide for benefits, to be paid upon the death of a member to his family, widow, relatives, orphans or other dependents. In *American Legion of Honor v. Perry*,<sup>1</sup> the Supreme Court of Massachusetts said: "The statute under which the plaintiff corporation is organized gives it authority to provide for the widow, orphans or other dependents upon deceased members, and provides that such fund shall not be liable to attachment. The class of persons to be benefited is designated and the corporation has no authority to create a fund for other persons than the class named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart to

<sup>1</sup> 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715.

await the death of the member, and then to pay it over to the person or persons of the class named in the statute, selected and appointed by the member during his life, and, if no one is so selected, it is still payable to one of the classes named." In a later case in the same court <sup>1</sup> the deceased was a member of a benefit association organized under the law of Massachusetts just referred to, authorizing such organizations to provide for a benefit for the family, widow, relations, orphans or other dependents of deceased members. He had designated as his beneficiary "my estate." The court says: "The designation by Dewey that this money should go to his estate, was invalid. If it were a part of his estate, it would be assets for the payment of debts and expenses of administration, and would be subject to an unrestricted disposition by will. But this is inconsistent with the statutes, and so beyond the powers of the parties." In this case the money had been paid to the executor, but the court held that he held it in trust to pay it over to the person entitled thereto.

In Ohio, under a somewhat similar statute, the Supreme Court, in passing upon a case, where a member of a benefit society attempted to dispose of the benefit by will and to a creditor, not related to him, held: <sup>2</sup> "That the plaintiff in error had no power to issue certificates of membership payable upon the death of an insured member to a person not an heir, or of the family of a deceased member, and that such a certificate is void, is too well established to admit of controversy. If the assured may designate the beneficiary of the insurance by testamentary appointment (a question the determination of which is not necessary in the case before us), it is very clear that such beneficiary must be either a member of his family, or one, who, upon his

<sup>1</sup> *Daniels v. Pratt*, 143 Mass. 221; 10 N. East. Rep. 166; 3 N. Eng. Rep. 480.

<sup>2</sup> *National Mutual Aid Association v. Gonser*, 43 Ohio St. 1; 1 West. Rep. 4; 1 N. East. Rep. 11.

death, may be his heir'' In a case in Michigan,<sup>1</sup> the Supreme Court of that State said: "It appears that under a Kentucky charter, and under the constitution as it stood prior to 1884, the benefits could be made payable to his family, or as the member should direct. This, apparently, would have made Nairn a competent beneficiary, if we can regard these constitutions as controlling the contract. But this benefit is payable by a corporation of the State of Missouri, and the laws of that State very clearly and expressly forbid corporations of this sort from paying benefits to any but the member's family or dependents. This prohibition is further strengthened by some further provisions making it unlawful to issue policies of life insurance, or for the benefit of the members themselves in any shape. The restrictions imposed by the laws of Missouri cannot be abrogated or changed by the corporation, and it cannot subject itself to any outside control, which will override the laws of its organization as a corporate body. The intent of the prohibition is clearly to shut out all persons who are not actual relatives, or standing in the place of relatives in some permanent way, or in some actual dependence on the member." The numerous cases which have arisen throughout the country, as a rule, support the principles enunciated in the foregoing statements.<sup>2</sup>

<sup>1</sup> *Knights of Honor v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826.

<sup>2</sup> *American Legion of Honor v. Perry*, 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715; *Elsev v. Odd-fellows*, etc., 142 Mass. 224; 2 N. Eng. Rep. 667; 7 N. East. Rep. 844; *Daniels v. Pratt*, 143 Mass. 216; 10 N. East. Rep. 166; 3 N. Eng. Rep. 480; *National Mut. Aid, etc. v. Gonser*, 43 Ohio St. 1; 1 West. Rep. 4; 1 N. East. Rep. 11; *State v. People's Mut. Ben. Assn.*, 42 Ohio St. 579; *State v. Moore*, 38 Ohio St. 7; *State v. Standard Life Assn.*, 38 Ohio St. 281; *Knights of Honor v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826; *Ky. Masonic Mut. Life Ins. Co. v. Miller's Admr.*, 13 Bush, 489; *Van Bibber's Admr. v. Van Bibber*, 82 Ky. 347; *Duvall v. Goodson*, 79 Ky. 224; *Masonic Mut. Relief Assn. v. McAuley*, 2 Mackey, 70; *Worley v. N. W. Masonic Aid Assn.*, 10 Fed. Rep. 227; *Expressmen's, etc., v. Lewis*, 9 Mo. App. 412; *Ballou v. Gile, etc.*, 50 Wis. 614; *Presb. Ass. Fund v. Allen*, 106 Ind. 593; 7 N. East. 317; 4 West.

§ 245. **The Same Subject: A More Liberal View.** — A seemingly contradictory case has been decided by the Supreme Court in Pennsylvania.<sup>1</sup> The action was brought by a creditor of the deceased member to whom the certificate had been made payable. The defense was that the society had no power to issue certificates payable to any other than the families of its members, the language of the charter being: "The purposes of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members." The lower court sustained the defense and held that the charter prohibited such a contract. In reversing this decision the language of the court was as follows: "We think this is too narrow and strained a view to take of this section of the charter. While it is true that the general purpose of the corporation is there stated to be, the maintenance of a society for benefiting and aiding widows and orphans of deceased members, it must be observed that this is only the statement of a general purpose. It is only the recital of an object sought to be accomplished, and which doubtless is accomplished in the great majority of cases, even though in exceptional cases the benefits may, by special contract, be paid to other persons than the widow or orphans. There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans. Nor is such a contract to be held void by reason of any necessary implication from the language of the charter for

Rep. 712; *Dietrich et al. v. Madison Rel. Assn.*, 45 Wis. 79; *Highland v. Highland*, 109 Ill. 366; *Addison v. N. E. Com. Travelers' Assn.*, 144 Mass. 591; 4 N. Eng. Rep. 639; 12 N. East. Rep. 407; *Skillings v. Mass-Ben. Assn. (Mass.)*, 15 N. East. Rep. 566; 5 N. Eng. Rep. 718; *Rice v. N. Eng. M. A. Soc. (Mass.)*, 5 N. Eng. Rep. 813; 15 N. East. Rep. 624.

<sup>1</sup> *Maneeley v. Knights of Birmingham*, 115 Pa. St. 305; 9 Atl. Rep. 41; 7 Cent. Rep. 633.

the widow and orphans may be much benefited, and in many ways, by a contract designating another beneficiary; as, for instance, if the member in his lifetime, desiring to establish a home for his wife and children, which they might hold after his death, borrowed money for that purpose and so used it and to secure the loan designated the lender as the beneficiary of his membership. Certainly his widow and orphans would be most materially benefited by such an arrangement or, if having a home, he met with disaster, and was about to lose it by a judicial sale, and should save it by a similar provision, his widow and orphans would be thereby benefited. Or, if having property and also debts, but not to the point of insolvency, he could borrow money by means of a membership with such an association, and he should become a member for that very purpose, the creditor possibly also paying the dues, and he could to that extent diminish his indebtedness during his life and thus leave that much more of his property to his widow and orphans, undoubtedly they would be thereby benefited. Or, he might borrow the money, and give it directly to his wife or children during his life, pledging his membership to the lender as above, and then also they would receive the full advantage of the transaction without waiting until his death. Many more illustrations of a similar character might easily be suggested, but is unnecessary. They all prove the same proposition, to wit: That it is entirely possible to benefit the widow or orphan by means of such a membership, although neither of them is the designated beneficiary." It must be noted, however, as to this case, that by the language of the charter, the object of the corporation was not *to pay to* the widows and orphans, etc., but *for the purpose of benefiting and aiding* the widows and orphans, etc. Other cases tend to support this liberal view, though none go so far.<sup>1</sup> The Supreme Court of Illinois has

<sup>1</sup> Folmer's Appeal, 87 Pa. St. 135; Lamont v. Grand Lodge Ia. Leg.

held<sup>2</sup> that, if a member under the charter could devise the benefits of his policy to a stranger, he might in the first instance take out the policy payable to a stranger, and that, having received the premiums and the contract being executed by the death of the member, the company was estopped to invoke the doctrine of *ultra vires* to defeat an action brought by the beneficiary.<sup>3</sup> The question is one of construction of particular words in the statutes and in the charters of these societies and necessarily no more general rule can be laid down than that if, by statute or charter, the beneficiaries of members are confined to certain classes, the designation of any one not of such class is void. The cases cited in the preceding and subsequent sections of this chapter sufficiently illustrate this doctrine.

**§ 246. Unless Contract or Statute Forbid, Choice of Beneficiary is Unlimited.** — In all cases the member may have as broad a range of choice in selecting his beneficiary as the organic law of his society gives him. If there is nothing in the charter or by-laws of the organization, or in the statutes of the State, restricting the appointment, the member may designate whomsoever he pleases and no one can question the right.<sup>3</sup>

**§ 247. Liberal Construction of Charter and By-laws: Lex loci.** — In determining whether the designated bene-

Honor, 31 Fed. Rep. 177; Sup. Lodge K. of H. v. Martin et al. (Pa.), 12 Ins. L. J. 628.

<sup>1</sup> Bloomington Mut. L. Ben. Assn. v. Blue, 120 Ill. 121; 11 N. E. Rep. 331; 8 West. Rep. 642.

<sup>2</sup> See also Lamont v. Hotel Men's B. Assn., 30 Fed. Rep. 817; Lamont v. Grand Lodge Ia. Leg. Honor, 31 Fed. Rep. 177.

<sup>3</sup> Basye v. Adams, 81 Ky. 368; Gentry v. Supreme Lodge, 23 Fed. Rep. 718; Massey v. Mut. Relief Soc., 102 N. Y. 523; 7 N. East. Rep. 619; 3 Cent. Rep. 755; Mitchell v. Grand Lodge 30 N. W. Rep. 865; Freeman v. Nat. Benefit Soc., 42 Hun, 252; Swift v. Ry. Conductor's. Assn., 96 Ill. 309; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Supreme Lodge, etc., v. Martin, 12 Ins. L. J. 628; 13 W. N. C. 160.

fiary comes within the class specified or not, the charter and by-laws of the society will be construed liberally so as to carry out the benevolent purposes of its organization, and yet not so as to violate the statute law of the State or contravene public policy.<sup>1</sup> In deciding the rights of the member in respect to the designation of beneficiary, the law of the place of the contract under which the power is given, will govern, for a contract, good at the place where made, is good everywhere, unless the statutes or public policy of the State where the contract is sought to be enforced forbid:<sup>2</sup> and the law of the situs of the subject of the power controls the execution of such power.<sup>3</sup>

§ 248. **Insurable Interest.** — In view of the fact that in many benefit societies no restrictions are placed upon the member in his choice of a beneficiary, so that it is not impracticable for a creditor or other party to bear the expense of a membership in a society of some one not related to or dependent upon him, in order to secure the ultimate fruits of the connection, it is evident that the law of insurable interest must here be considered. It is in respect to the beneficiary, or person for whose benefit the insurance is effected, that the greatest differences are found between the form of insurance furnished by benefit societies and that given by regular life insurance corporations. The latter are free to contract with whom they choose and in the manner they prefer, subject only to the restraints imposed by public policy; the beneficiaries of the societies however are generally limited to specified classes, either relatives or dependents, and

<sup>1</sup> *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 374; *Ballou v. Gile*, 50 Wis. 614; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Maneeley v. Knights of Birmingham*, 115 Pa. St. 305; 9 Atl. Rep. 41; 7 Cent. Rep. 633; *Elsey v. Odd-fellows, etc.*, 142 Mass. 224.

<sup>2</sup> *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Knights of Honor v. Nairn*, 60 Mich. 44; *Daniels v. Pratt*, 143 Mass. 216; *Bishop on Contr.* §§ 1383-1389 inc.

<sup>3</sup> *Bingham's Appeal*, 64 Pa. St. 345.



out of these they cannot go. The subject of insurable interest is a most important one in the law of life insurance, for it has often been considered by the courts in the reported cases and has been discussed with great earnestness and vigorous reasoning. Though the contract of life insurance is not strictly one of indemnity, the policy of the law does not permit any one to insure the life of another in which he has not at the time what is called an insurable interest, because such contract would be in the nature of a wager or speculation in human life. The Supreme Court of the United States, in passing upon the point whether a divorced woman could recover upon a policy of insurance on the life of a former husband,<sup>1</sup> reviews the law of insurable interest as follows: "It is generally agreed that mere wager policies, that is, policies in which the assured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void as against public policy. \* \* \* But precisely what interest is necessary in order to take a policy out of the category of mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great because there insurance is construed as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man

<sup>1</sup> Connecticut Life Insurance Company v. Schaefer, 94 U. S. 457.

may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons on their joint lives for the benefit of the survivor or survivors. The old tontines were based substantially on this principle and their validity has never been called in question. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point the remarks of Chief Justice Shaw, in a case which arose in Connecticut (in which State the present policy originated), seem to us characterized by great good sense. He says:<sup>1</sup> 'In discussing the question in this commonwealth (Massachusetts) we are to consider it solely as a question of common law, unaffected by the statute of 14 Geo. III. passed about the time of the commencement of the revolution and never adopted in this State. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the *cestui que vie*; that his temporal affairs, his just hopes and well grounded expectations of support, of patronage and advantage in life, will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount the premium is computed to be a precise equivalent for the risk taken. We cannot doubt,' he continues, 'that a parent has an interest in the life of a child and *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents are bound to support their lineal kindred when they may

<sup>1</sup> Loomis v. Insurance Co., 6 Gray, 399.

stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law.' We concur in these views. \* \* \* We do not hesitate to say however that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself.<sup>1</sup> Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.' The rule prevails in England under judicial construction of the statute of 14 Geo. III.<sup>2</sup> that there must be an interest at the time of effecting the insurance, but that it need not continue until death.<sup>3</sup>

§ 249. **The Same Subject: Wagering Policies.**—As said in the citation just made, the right of a man to insure his own life and make the policy payable to whomsoever he chooses irrespective of the question of insurable interest, has never been doubted,<sup>4</sup> but the transaction must not be a cover for a speculation and wager contravening the gen-

<sup>1</sup> See *Tyler v. Odd-fellows, etc.*, 145 Mass. 134; 5 N. Eng. Rep. 191; 13 N. East. Rep. 360.

<sup>2</sup> *Dalby v. Ins. Co.*, 15 C. B. 365, overruling *Godsall v. Boldero*, 9 East, 72; *Law v. Lond. I. P. Co.*, 3 Eq. R. 338; 1 Kay & J. 223; 124 L. J. Ch. 196; 1 Jur. (N. S.) 178.

<sup>3</sup> *Post*, §§ 253 and 397.

<sup>4</sup> *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*; *Ætna Life Ins. Co. v. France*, 94 U. S. 561; *Goodrich v. Treat*, 3 Colo. 408; *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294; *Fairchild v. N. E. M. L. Assn.*, 51 Vt. 613; *North Am. L. Ins. Co. v. Craigen*, 6 Russ. & G. (Nova Scotia) 440; *Elkhart, etc., v. Houghton*, 103 Ind. 286; 2 N. East. Rep. 763; 1 West. Rep. 284; *Bloomington M. L. B. Assn. v. Blue*, 120 Ill. 121; 11 N. East. Rep. 331; 8 West. Rep. 642.

eral policy of the law.<sup>4</sup> In a recent case in Pennsylvania,<sup>2</sup> a State where the subject of insurable interest and wagering policies has been much discussed, the Supreme Court gives an intimation as to what should be a rule in determining insurable interest and what makes the policy a wagering one. In this case the action was brought by the administrators of Grant to recover the amount of a policy taken out by Kline on Grant's life, less the debt of Grant to Kline. The policy had been made payable to Kline and was for the sum of \$3,000, while the debt of Grant was only \$743, as Kline claimed, or \$214 as claimed by the administrators. The court said: "It was not disputed at the trial below that there was a *bona fide* indebtedness of Grant to Kline, at the time the policy was taken out, of something over \$300. It was also in evidence that one or more policies had been taken out on Grant's life for Kline's benefit prior to the policy in question. These policies had been abandoned because of the insolvency of the companies, or for other sufficient reason. Kline had paid in premiums thereon several hundred dollars. While the money thus fruitlessly paid in premiums may not have amounted to an insurable interest in the life of Grant, for the reason that such payments did not make him a creditor for their amount, we think they show good faith in the transaction. This case is to be determined upon the facts as they existed at the time the last policy was taken out; and, if both Grant and Kline saw proper to treat the premiums paid as an insurable interest, Grant's administrators have no standing to say

<sup>1</sup> *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 473; *Stevens v. Warren*, 101 Mass. 564; *Keystone M. B. Assn. v. Norris*, 115 Pa. St. 446; 8 Atl. Rep. 638; 7 Cent. Rep. 204; *Ruth v. Katterman*, 112 Pa. St. 251; *Gilbert v. Moose*, 104 Pa. St. 74. In this case the court says: "If we admit that one man may insure his life for the benefit of another, who is neither a relative nor a creditor, our whole doctrine concerning wagering policies goes by the board." *Insurance Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Cam-mack v. Lewis*, 15 Wall. 643.

<sup>2</sup> *Grant v. Kline*, 115 Pa. St. 618; 9 Atl. Rep. 150; 7 Cent. Rep. 626.

they were not. The company could have defended upon this ground, but it did not. It paid the money over to Kline without question. This brings us to the main question, was the amount of insurance so disproportioned to Kline's interest in the life of Grant as to make this a wagering policy? We approach this question with caution, the more so that this court has not yet laid down a rule upon this subject. That we shall be compelled some day to do so is possible. We have said that the sum insured must not be disproportioned to the interest the holder of the policy has in the life insured. To take out a policy of \$5,000 to secure a debt of five dollars would be such a palpable wager that no court would hesitate to declare it so as a matter of law. Care must be taken, also, that a debt shall not be collusively contracted for the mere purpose of creating an insurable interest. Mr. Dickens, in his inimitable 'Pickwick Papers,' has shown how a debt may be created for the purpose of lodging the debtor in prison by collusion with the creditor. Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life as shown by the Carlisle tables. This view, however, has never yet been adopted by this court in any adjudicated case; nor do we feel compelled to define the disproportion now in view of the particular facts of the case in hand. We do not regard it as either immoral or wagering for Kline to attempt to secure the sums he had already fruitlessly paid in premiums on Grant's life; and if Grant had no objection thereto, and assisted him therein, I do not see that any one could object to this but the company. Again, we have the declarations of Grant that he owed Kline a considerable sum of money, — the precise amount not stated; that Kline had aided him in various ways; had never refused him a favor, etc. In view of their connection

by marriage, and of their admitted relations, it is at least probable that Kline had aided him at many times and in various ways pecuniarily that are not represented by any evidences of debt. And, if the sum insured was regarded by Grant as a reasonable amount to indemnify Kline, with what grace can Grant's administrators come in and allege that it was not? They have no possible equity. Grant never paid one dollar of the premiums; and if they are allowed now to recover, it is not by virtue of any equity, but by force of an inexorable rule of public policy which treats it as a wagering policy, and declares the policy-holder a trustee for the person insured as to the entire proceeds, save only the money actually loaned with the premiums paid. Assuming, then, that Kline might, with Grant's consent and as against his administrators, lawfully seek to indemnify himself for the premiums paid and lost, we have the sum of \$743.56 as the amount which Kline was out of pocket. We do not know what Grant's expectation of life was when the policy was taken out, and there is nothing before us upon which we could base any reliable opinion. But it appears he was sixty-five years of age and was an unusually good risk. While we do not know what the amount of the annual premium was, we do know that it must have been a considerable sum on \$3,000 for a man of sixty-five years; and, with the annual interest it would roll up rapidly. That Grant died within a year is not to the purpose; he might have lived long enough for the debt and premiums at compound interest to have exceeded the amount of the policy. Surely, in such case, we cannot say, as a matter of law, that the disproportion was so great as to make it a wagering policy." In another case in the same court,<sup>1</sup> where A., an old woman, was living with her daughter, and B., the father of her son-in-law, with whom the latter lived, had A.'s life insured, his only

<sup>1</sup> Batdorff Exr. v. Fehler, 8 Cent. Rep. 230; 9 Atl. Rep. 468.

interest being, as stated in the application, that he had "kept her a certain length of time and promises to keep her as long as she lives." Upon the death of A., B. collected the amount of the policies and was sued by A.'s executors for the money so collected, it was held that, as a matter of law, the insurance could not be held to be speculative.<sup>1</sup> Where a debtor, at the solicitation of his creditor, to whom he owed \$600, effected an insurance of \$2,000 on his life for the benefit of his creditor, the latter being designated in the policy as the beneficiary; and agreeing to pay the expense of effecting the insurance and keeping it up, with a condition that the debtor might at any time pay the debt and reimburse the creditor, and thereby become entitled to an assignment of the policy. After the death of the assured and payment of the amount named in the policy to the beneficiary, it was held<sup>2</sup> that the administrator of the deceased could not maintain an action against the beneficiary to recover the excess over the debt and amount of premiums paid.

§ 250. **The Same Subject: Relatives: Creditors.**—Although positive in its denunciation of wager policies, the Supreme Court of the United States has been liberal in its views concerning the insurable interest of relatives. In a leading case<sup>3</sup> it said: "The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the assured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary, or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere

<sup>1</sup> *Fitzgerald v. Hartford L. & A. Ins. Co.* (Conn.), 13 Atl. Rep. 673; *Fitzpatrick v. same*, 6 N. Eng. Rep. 180.

<sup>2</sup> *Amick v. Butler*, 111 Ind. 578; 9 West. Rep. 842; 12 N. East. Rep. 518.

<sup>3</sup> *Warnock v. Davis*, 104 U. S. 779.

wager, by which the party taking the policy is directly interested in the early death of the assured." The same court has held<sup>1</sup> that a sister has an insurable interest in the life of her brother from the mere relationship. The same principle was also determined by the Supreme Court of Massachusetts in an early case.<sup>2</sup> A brother has, however, been held to have no insurable interest in the life of a brother;<sup>3</sup> but under all circumstances a wife has an insurable interest in the life of her husband;<sup>4</sup> though it has been said that to support the interest she must be his lawful wife;<sup>5</sup> and divorce subsequent to the policy does not vitiate such policy,<sup>6</sup> and it has even been held that a woman, living with a man as his wife, though not legally married to him, has an insurable interest in his life.<sup>7</sup> If a woman is the wife of the insured the fact that she is named in the policy by another name does not affect her rights.<sup>8</sup> In a mutual benefit society the description of the beneficiary as the "wife" of the member, when she was not so in fact, has been held not to invalidate the designation.<sup>9</sup> A woman engaged to be married to a man has an insurable interest in his life;<sup>10</sup> but in Massachusetts an engaged woman has been held not to be a "dependent" upon her betrothed within the meaning of the statute authorizing members of benefit so-

<sup>1</sup> *Ætna L. Ins. Co. v. France*, 94 U. S. 561

<sup>2</sup> *Lord v. Dall*, 12 Mass. 115; 7 Am. Dec. 38.

<sup>3</sup> *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 100.

<sup>4</sup> *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Ætna Life Ins. Co. v. France*, 94 U. S. 561; *Warnock v. Davis*, 104 U. S. 779; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 283; *Gambs v. Covenant Mut. Life Ins. Co.*, 50 Mo. 44.

<sup>5</sup> *Holabird v. Atlantic Ins. Co.*, 2 Dill. 166; 2 Ins. L. J. 588.

<sup>6</sup> *Conn. Mut. Life Ins. Co. v. Schaefer*, *supra*; *McKee v. Phoenix Mut. Life Ins. Co.*, 28 Mo. 383; 75 Am. Dec. 129. But see *Tyler v. Odd-fellows, etc., Soc.*, 145 Mass. 134; 5 N. Eng. Rep. 191; 13 N. E. Rep. 360.

<sup>7</sup> *Equitable Ass. Soc. v. Patterson*, 41 Ga. 338.

<sup>8</sup> *Watson v. Centennial Mut. Life Assn.*, 21 Fed. Rep. 693.

<sup>9</sup> *Durian v. Central Verein, etc.*, 7 Daly, 168.

<sup>10</sup> *Chisholm v. National C. Life Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 414.



cieties to designate "dependents" as their beneficiaries;<sup>1</sup> and in one society at least a member is expressly allowed by the charter to designate his betrothed as his beneficiary.<sup>2</sup> Unless it appears that the wife was insane, or an invalid, the presumption is that she is a helpmate to her husband and he has an insurable interest in her life.<sup>3</sup> The mere relationship of a father and son has been held not to give the latter an insurable interest in the life of the former;<sup>4</sup> although other courts have decided that a son has an insurable interest in the life of a father whom he may be compelled by law to support,<sup>5</sup> and a grandson in the life of his grandfather who resided with him.<sup>6</sup> In a number of cases, however, the rule has been declared that from the very relationship of the parties the parent has an insurable interest in the life of the child, except possibly when the child is of age,<sup>7</sup> and the child in the life of the parent.<sup>8</sup> A mother has an insurable interest in the life of her son.<sup>9</sup> But a mother not residing with a son has been held not to be a "dependent" upon him within the meaning of the statutes of Massachusetts.<sup>10</sup> It has been said that a daughter by the mere virtue of relationship has no interest in her mother's life.<sup>11</sup> In Missouri the rule has been laid down that the in-

<sup>1</sup> *Am. Legion of Honor v. Perry*, 140 Mass. 580.

<sup>2</sup> *Knights of Pythias*.

<sup>3</sup> *Currier v. Continental Life Ins. Co.*, 57 Vt. 496.

<sup>4</sup> *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180.

<sup>5</sup> *Reserve Mut. Life Ins. Co. v. Kane*, 81 Pa. St. 154; 22 Am. Rep. 741.

<sup>6</sup> *Elkhart Mut., etc., Assn. v. Houghton*, 103 Ind. 286.

<sup>7</sup> *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Worthington v. Curtis*, L. R. 1 Ch. D. 419; 45 L. J. Ch. D. 259; 33 L. T. (N. S.) 828; 24 W. R. 221.

<sup>8</sup> *Loomis v. Eagle Life Ins. Co.*, 6 Gray, 396; *Valley Mut. Life Assn. v. Teewalt*, 79 Va. 421; *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; 71 Am. Dec. 529; *Reserve Mut. Life Ins. Co. v. Kane*, 81 Pa. St. 154; *Grattan v. National Life Ins. Co.*, 15 Hun, 74; *Corson's Appeal*, 113 Pa. St. 438; 6 Atl. Rep. 213; 4 Cent. Rep. 307; *Forbes v. Am. Mut. Life Ins. Co.*, 15 Gray, 249.

<sup>9</sup> *Reif v. Union Life Ins. Co.*, 17 Ins. Chron. 3; 18 C. L. J. 347.

<sup>10</sup> *Elsev v. Odd-fellows' Mut. Relief Assn.*, 142 Mass. 224.

<sup>11</sup> *Continental Life Ins. Co. v. Volger*, 89 Ind. 572.

insurable interest in the life of another person must be a direct and pecuniary interest, and that a person has not such an interest in the life of his wife or child simply in the character of a husband or parent.<sup>1</sup> In the same State it has been held that an uncle has no insurable interest in the life of a nephew;<sup>2</sup> and the Supreme Court of Pennsylvania has said<sup>3</sup> that a nephew has no insurable interest in the life of his aunt. A stepson has no insurable interest in his stepfather's father;<sup>4</sup> nor has a son-in-law in the life of his mother-in-law.<sup>5</sup> The Supreme Court of Connecticut has held that the providing by a relative of a home and proper care for life is sufficient consideration for the assignment by a laboring woman, living apart from her husband and childless, of her life insurance policy if the transaction was in good faith and not a wager.<sup>6</sup> A creditor has an insurable interest in the life of his debtor;<sup>7</sup> and can insure the life of the debtor without his consent;<sup>8</sup> but such interest is limited to the amount of the debt.<sup>9</sup> The debt to give an insurable interest must be valid. The holder of a note given for money

<sup>1</sup> Charter Oak Life Ins. Co. v. Brant, 47 Mo. 419; Gambs v. Covenant Mut. Life Ins. Co., 50 Mo. 44.

<sup>2</sup> Singleton v. St. Louis, etc., Life Ins. Co., 66 Mo. 63; 27 Am. Rep. 321.

<sup>3</sup> Appeal of Corson, 113 Pa. St. 438; 6 Atl. Rep. 213; 4 Cent. Rep. 307.

<sup>4</sup> Gilbert v. Moose's Admr., 104 Pa. St. 74.

<sup>5</sup> Rombach v. Piedmont, etc., Ins. Co., 35 La. Ann. 233; Stoner v. Line, 16 W. N. C. 187.

<sup>6</sup> Fitzgerald v. Hartford L. & A. Ins. Co., 13 Atl. Rep. 673; *s. c.* *nomen Fitzpatrick as plff.*, 6 N. Eng. Rep. 180.

<sup>7</sup> Suc. of Hearing, 26 La. Ann. 326.

<sup>8</sup> Rawls v. American Ins. Co., 27 N. Y. 282; Mowry v. Insurance Co., 9 R. I. 346; Cunningham v. Smith's Exrs., 70 Pa. St. 450; Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; Cammack v. Lewis, 15 Wall. 643.

<sup>9</sup> Cammack v. Lewis, *supra*; Warnock v. Davis, 104 U. S. 779; Drysdale v. Piggott, etc., 22 Beav. 238; Von Lindenau v. Desborough, 3 Car. & P. 353; 8 Barn. & C. 586; Ruth v. Katterman, 112 Pa. St. 251; Appeal of Corson, 113 Pa. St. 438; 6 Atl. Rep. 213; 4 Cent. Rep. 307; Siegrist Admr. v. Schmoltz, 113 Pa. St. 326; 6 Atl. Rep. 47; 5 Cent. Rep. 230; *ante*, § 248; *post*, § 397.

won at play has no insurable interest in the debtor's life; <sup>1</sup> nor does a mere moral claim confer insurable interest; <sup>2</sup> but the fact that a debt is barred by the statute of limitations does not deprive a creditor of insurable interest; <sup>3</sup> nor does the fact that the debtor is an infant.<sup>4</sup> A partner has an insurable interest in the life of a partner; <sup>5</sup> and a bondsman in the life of the person on whose bond he is a surety; <sup>6</sup> and joint obligors in a bond in each other's lives; <sup>7</sup> and a surety on a note in the life of the principal,<sup>8</sup> and a tenant has an insurable interest in the landlord's life when the latter is himself only a tenant for life, because the term depends upon the continuance of the life.<sup>9</sup> Where a member of a mining association employs a substitute to represent him and work in his stead in the mines, he has an insurable interest in the life of his substitute.<sup>10</sup> A master has an insurable interest in the life of his servant,<sup>11</sup> and a servant in the life of his master.<sup>12</sup> If the person effecting the insurance has no insurable interest in the life of the insured, he cannot recover more than the amount of premiums paid with interest, but if he collects the whole amount of the insurance he must pay over to the personal representatives of the insured the excess over the

<sup>1</sup> *Dwyder v. Edie*, Ang. on Ins., § 296; 2 Parke Ins. (7th ed.) 639.

<sup>2</sup> *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35.

<sup>3</sup> *Rawls v. American L. Ins. Co.*, 27 N. Y. 282.

<sup>4</sup> *Rivers v. Gregg*, 5 Rich. Eq. 274.

<sup>5</sup> *Morrell v. Trenton, etc., L. Ins. Co.*, 10 Cush. 282; 57 Am. Dec. 92 and note; *Valton v. National F. Ins. Co.*, 22 Barb. 9; 20 N. Y. 32; *Conn. M. L. Ins. Co. v. Luchs*, 108 U. S. 498; *Hoyt v. N. Y. L. Ins. Co.*, 3 Bosw. 440; *Bevin v. Conn. M. L. Ins. Co.*, 23 Conn. 244; *post*, § 397.

<sup>6</sup> *Scott v. Dickson*, 108 Pa. St. 6.

<sup>7</sup> *Brandford v. Saunders*, 25 W. R. 650.

<sup>8</sup> *Lea v. Hinton*, 5 De G. M. & G. 823.

<sup>9</sup> *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650.

<sup>10</sup> *Trenton, etc., Ins. Co. v. Johnson*, 24 N. J. L. 576.

<sup>11</sup> *Miller v. Eagle Ins. Co.*, 2 E. D. Smith, 268; *Summers v. U. S., etc., Trust Co.*, 13 La. Ann. 504; *Woodfin v. Ashville, etc., Ins. Co.*, 6 Jones L. 558.

<sup>12</sup> *Hebden v. West*, 3 Best & Sm. 579; 32 L. J. Q. B. 85; 9 Jur. (N. S.) 747; 7 L. T. 854; 11 W. R. 422.

amount of the premiums and interest.<sup>1</sup> No action can be maintained on a policy of life insurance, issued to one not having an insurable interest in the life insured, against the company issuing it, by the personal representatives of the person whose life was insured, for there is no privity of contract between them; nor is the company bound by a notice from such personal representatives forbidding it to pay over the amount of such insurance to the payee named in the policy.<sup>2</sup>

§ 251. **General Rule.** — It is seen from the preceding citations that the authorities are not altogether in harmony and it would be difficult, if not impossible, to lay down a general rule that would apply to all cases. It can with safety be said, however, that in all cases of insurance by one person upon the life of another some pecuniary interest or advantage, to be derived or received from the continuance of the life insured by the person procuring or effecting such insurance, must exist in order to relieve the contract from the stigma of being a wager policy and against public policy. A careful examination of the cases will show that wherever the point has been raised the courts have considered whether or not the person procuring the policy was interested pecuniarily to an appreciable extent in the life insured. Perhaps a slighter interest will support a policy on the life of a relative than in other cases, but the interest must exist in some form. Where a wife insures the life of a husband or the husband that of the wife, it is clear that there is a pecuniary interest of a decided character, and so where a parent insures the life of a child, for there is the expectation of support when age shall im-

<sup>1</sup> *Warnock v. Davis*, 104 U. S. 775; *Gilbert v. Moose*, 104 Pa. St. 74; *Ruth v. Katterman*, 112 Pa. St. 251; *Siegrist's Admr. v. Schmoltz*, 113 Pa. St. 326; *post*, §§ 302, 303, 397.

<sup>2</sup> *Bomberger v. United Brethren, etc., Soc. (Pa.)*, 18 W. N. C 459; 4 Cent. Rep. 694; 6 Atl. Rep. 41; *post*, §§ 302, 397 *et seq.*

pair the abilities of the former. "The interest required," says a leading case,<sup>1</sup> "need not be such as to constitute the basis of any direct claim in favor of the plaintiff upon the party whose life is insured; it is sufficient if an indirect advantage may result to the plaintiff from his life."

§ 252. **The Doctrine of Insurable Interest Applied to Contracts of Benefit Societies.** — Many of the cases, involving the question of insurable interest, cited in the four preceding sections, are those in which benefit societies were parties. As a rule, however, it is only when the right of designation of beneficiary is unrestricted, can the point of insurable interest be raised.<sup>2</sup> Even then, as the member must be *prima facie* considered as the party effecting the insurance and free to choose whom he pleases as the recipient of his bounty, he can designate whomsoever he likes. Clearly, however, the contract must not be, in fact, a cover for a wagering transaction and if the creditor, or a person having no insurable interest, should himself pay the entrance fee and assessments and be the mover in the matter, the certificate would be void and the beneficiary could not recover. If the beneficiaries are, by the charter, limited to certain classes, as family, relatives, etc., and the member designate some one not of such classes, the designation is void, and, if the money be paid to such beneficiary, he holds it as trustee for the persons entitled to receive, under the laws of the society, in default of a designation.<sup>3</sup>

§ 253. **Policy or Designation of Beneficiary Valid in Its Inception Remains so.** — The general rule undoubtedly is that a policy of life insurance, or a designation of beneficiary, valid in its inception, remains so, although the in-

<sup>1</sup> Trenton, etc., Ins. Co. v. Johnson, 24 N. J. L. 586.

<sup>2</sup> Freeman v. National Benefit Soc., 42 Hun, 252.

<sup>3</sup> Am. Legion of Honor v. Perry, 140 Mass. 580; Daniels v. Pratt, 143 Mass. 216; *ante*, § 241.

surable interest, or relationship of the beneficiary, has ceased, unless it is otherwise stipulated in the contract.<sup>1</sup> Where, however, the beneficiaries of members of benefit societies were, by statute, restricted to the family, or dependents, or relatives of their members, and a member of one of such societies designated his wife, from whom he afterwards was divorced, it was held<sup>2</sup> that she lost her rights under the designation in consequence of such divorce. This case is apparently against authority, but the reason given is, that under the statute, the relationship or *status* must exist at the time of the maturity of the contract.

§ 254. **Lawfulness of Designation of Beneficiary a Question of Construction.** — From the preceding sections it appears that the question, who is entitled to be the beneficiary of a member of a benefit society, is one of construction of the laws of such society, and the terms used in them. Hardly any two of such societies, as far as the cases show, use precisely the same language, yet in all certain generic terms are used. The benefits are variously required to be made payable to: “the widow and children of deceased member;”<sup>3</sup> “widow, orphan, heir, assignee or legatee;”<sup>4</sup> “families or assigns;”<sup>5</sup> “family or dependents;”<sup>6</sup> “widow, orphan children and other persons dependent on

<sup>1</sup> Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457; McKee v. Phoenix M. L. Ins. Co., 28 Mo. 383; 75 Am. Dec. 129; Clark v. Allen, 11 R. I. 439; Dalby v. India & London Ass. Co., 15 C. B. 365; Campbell v. N. Eng. Mut. L. Ins. Co., 98 Mass. 381; Provident L. Ins. Co. v. Baum, 29 Ind. 236. *Ante*, § 248; *post*, § 397.

<sup>2</sup> Tyler v. Odd-fellows' Mut. Relief Assn. 145 Mass. 134; 5 N. Eng. Rep. 191; 13 N. East. Rep. 360.

<sup>3</sup> Duvall v. Goodson, 79 Ky. 224; Dietrich v. Madison Relief Assn., 45 Wis. 79; Kentucky Masonic M. L. I. Co. v. Miller's Admr., 13 Bush, 489.

<sup>4</sup> Masonic Mut. R. Assn. v. McAuley, 2 Mackey, 70.

<sup>5</sup> Massey v. Mut. R. A., 102 N. Y. 523.

<sup>6</sup> Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826.

him; ”<sup>1</sup> “ person or persons last named by deceased and entered, by his order, on the will book of the company; ”<sup>2</sup> “ widows, orphans, heirs or devisees; ”<sup>3</sup> “ legal representatives; ”<sup>4</sup> “ widows, orphans, heirs and devisees; ”<sup>5</sup> “ to his family or as he may direct; ”<sup>6</sup> “ families and heirs; ”<sup>7</sup> “ to his family or those dependent on him; ”<sup>8</sup> “ to family, orphans or dependents; ”<sup>9</sup> “ families or relatives; ”<sup>10</sup> “ families of deceased members or their heirs. ”<sup>11</sup> By the laws of some of the leading benefit societies the benefits are variously payable to: “ family or those dependent on him; ”<sup>12</sup> “ members of his family, or some one related to him by blood or who shall be dependent on him; ”<sup>13</sup> “ to the family, orphans or dependents; ”<sup>14</sup> “ those related to or dependent upon him; provided member can name betrothed, subordinate lodge, endowment rank section, or brother knight; ”<sup>15</sup> “ member, or members of his family, or person, or persons dependent on him; ”<sup>16</sup> “ widows, orphans and heirs at law of deceased members or to such uses and purposes as he may, by last will and testament, appoint. \* \* \* No certificate shall be made payable to member himself or to

<sup>1</sup> Addison v. N. E. C. Travelers' Assn., 144 Mass. 591; 4 N. Eng. Rep. 639; 12 N. East. Rep. 407.

<sup>2</sup> Sup. Counc. Catholic Ben. Assn. v. Priest, 46 Mich. 429.

<sup>3</sup> Covenant M. Benefit Assn. v. Sears, 114 Ill. 108.

<sup>4</sup> Expressmen's Aid Soc. v. Lewis, 9 Mo. App. 412.

<sup>5</sup> Worley v. N. W. Masonic Aid Assn., 10 Fed. Rep. 227.

<sup>6</sup> Gentry v. Sup. Lodge, etc., 23 Fed. Rep. 718; Mitchell v. Grand Lodge, etc., 70 Ia. 360; 30 N. W. Rep. 865.

<sup>7</sup> National Mut., etc., Assn. v. Gonser, 43 Ohio St. 1.

<sup>8</sup> Ballou v. Gile, etc., 50 Wis. 614.

<sup>9</sup> Am. Legion of Honor v. Perry, 140 Mass. 580.

<sup>10</sup> Presbyterian Assur. Fund v. Allen, 106 Ind. 593; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347.

<sup>11</sup> Elsey v. Odd-fellows', etc., 142 Mass. 224.

<sup>12</sup> Royal Arcanum.

<sup>13</sup> Ancient Order United Workmen.

<sup>14</sup> American Legion of Honor.

<sup>15</sup> Knights of Pythias.

<sup>16</sup> Knights of Honor.

any one not having insurable interest in his life.”<sup>1</sup> It becomes important, then, to know who are included in these generic terms, “families,” “orphans,” “children,” “heirs,” “legatees,” “relatives,” “legal representatives,” “devises” and “dependents.”

**§ 255. Rules of Construction in Cases of Designation of Beneficiary.** — The principles governing the construction of the charters, laws and certificates of benefit societies, as well as of the various statutes relating to them, are of a manifold nature and analogous to the general rules of construction of statutes, contracts and wills, for the subject-matter partakes of the characteristics of all. The first essential of the designation of beneficiary is that it conform to the requirements of the statute under which the society exists, or at least violate no provisions of any statute; the designation must also be in conformity with the terms of the contract of the membership. If the meaning of the member is not clear, then the inquiry is to ascertain it. The same general rules of construction apply to the designation of beneficiaries that apply to all written documents, but the interpretation of some generic terms must be separately discussed. The primary rule is that the intent of the legislature, parties to a contract or designator must be first ascertained and then carried into effect;<sup>2</sup> and this intention must be judged of exclusively by the words of the instrument, if unambiguous, as applied to the subject-matter and the surrounding circumstances.<sup>3</sup> The whole of the statute, law, or designatory writing, must be looked at and considered and words are supposed, unless the contrary be shown, to have been used in their ordinary every-day sense and with the meaning a long line of judicial decisions

<sup>1</sup> Mo. Masonic Mutual Ben. Assn.

<sup>2</sup> Bishop on Con., § 380; 2 Pars. on Con., p. \* 494; 1 Redf. on Wills, p. \* 433 and vol. 2, p. \* 20.

<sup>3</sup> 1 Redf. on Wills, p. \* 433; Bishop on Con., § 381.



has given them.<sup>1</sup> It is not necessary to here refer in detail to the other numerous rules of construction that have been laid down by a long series of judicial decisions, collected and digested by learned and accurate commentators; the text-books upon contracts, statutes, wills and kindred subjects must be consulted by those who wish to search deeper into the law governing particular cases. The courts substantially agree that the rules and regulations of benefit societies are to be construed liberally in order to effect the benevolent objects of their organization.<sup>2</sup> And the court will, if possible, so construe the designation as to bring it within the power given by the statutes and sustain its legality.<sup>3</sup> We can have a wider range of authority in searching for precedents for construing the meaning of the language used in designations of beneficiary, as well as in the laws of these societies and statutes relating to them, because of the analogies that have been found between such designations and laws, so far as disposition of property is concerned, and wills. The Supreme Court of Michigan, for example, has said:<sup>4</sup> "The same rules of construction should be applied to dispositions of property created by those mutual benefit associations as are applied to bequests

<sup>1</sup> Bishop on Con., § 377; 1 Redf. on Wills, pp. \* 434 and 438, and vol. 2, p. \* 19.

<sup>2</sup> Supreme Lodge K. of P. v. Schmidt, 98 Ind. 381; Ballou v. Gile, 50 Wis. 614; Erdmann v. Mutual Ins. Co., 44 Wis. 376; Maneely v. Knights of Birmingham, 115 Pa. St. 306; 9 Atl. Rep. 41; 7 Cent. Rep. 633; Sup. Lodge K. of H. v. Martin, (Pa.), 12 Ins. L. J. 628; 13 W. N. C. 160; American Legion of Honor v. Perry, 140 Mass. 580; Gundlach v. Germania, etc., 4 Hun, 339; Expressman's Mut. Aid Assn. v. Lewis, 9 Mo. App. 412; Dietrich et al. v. Madison Relief, etc., 45 Wis. 79; Massey et al. v. Mutual Relief Assn., 102 N. Y. 523; Van Bibber's Admr. v. Van Bibber, 82 Ky. 347; Duvall v. Goodson, 79 Ky. 224; Masonic Mut. Relief Assn. v. McAuley, 2 Mackey, 70; Whitehurst Admr. v. Whitehurst (Va.), 1 S. E. Rep. 801.

<sup>3</sup> Elsey v. Odd-fellows' Mut. Relief Assn., 142 Mass. 224; Am. Legion of Honor v. Perry, 140 Mass. 580; 2 Pars. on Con., p. \* 505.

<sup>4</sup> Union Mutual Aid Assn. v. Montgomery, 38 N. W. Rep. 588; 14 West. Rep. 877.

by will." And Chief Justice Cofer, of the Kentucky Court of Appeals, has said:<sup>1</sup> "A life policy for the benefit of the family of the person procuring, though not a testament, is in the nature of a testament, and in construing it the courts should treat it, as far as possible as a will, as in so doing they will more nearly approximate the intention of the persons, the destination of whose bounty is involved in such cases." In other cases this analogy has been mentioned.<sup>2</sup> It is a settled principle in wills that they take effect upon the death of the testator, and are treated as speaking from that time.<sup>3</sup> Following the analogies above noticed, it follows that the designation of beneficiaries by the members of mutual benefit societies takes effect only upon the death of such members and the benefit certificate confers upon the beneficiary only an inchoate, contingent expectation, liable to be diverted either by the death of the beneficiary before that of the member, or by a revocation of the appointment and a naming of another beneficiary. Upon the death of the member then the benefit certificate takes effect, so far as to vest in the beneficiary an absolute right to the benefit money.<sup>4</sup>

§ 256. **Family.** — In the specification of the persons who may be designated as beneficiaries, the term which most frequently occurs in the charters of benefit societies, and also in the statutes authorizing their existence and doing of certain acts, is "family." The word has been frequently the subject of judicial discussion in two classes of cases, those involving homestead rights and those relating to the con-

<sup>1</sup> Duvall v. Goodson, 79 Ky. 224.

<sup>2</sup> Continental L. Ins. Co. v. Palmer, 42 Conn. 65; Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703; National American Assn. v. Kirgin, 28 Mo. App. 80.

<sup>3</sup> 2 Redf. on Wills, 10-12; 2 Jarm. on Wills, 406; Shotts v. Poe, 47 Md. 513; Davidson v. Dallas, 14 Ves. 576.

<sup>4</sup> Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703; Union M. Aid Assn. v. Montgomery (Mich.), 38 N. W. Rep. 588; 14 West. Rep. 877.

struction of wills. Very different results follow as the one or the other class of decisions is followed, for in homestead laws the intent of the legislature is evidently to protect a person who has others, who are dependent upon his labors, abiding with him under the same roof. On the other hand, in construing wills, the object is to ascertain the intention of the testator. The latter body of cases favor a more liberal construction than the former. The definition given by Bouvier is comprehensive<sup>1</sup> and is this: "Father, mother and children. All the individuals who live under the authority of another, including the servants of the family. All the relations who descend from a common ancestor, or who spring from a common root." We cannot understand that those persons who are hired to assist in household work are included among those termed servants in this definition. In discussing this word as affecting rights of homestead, and after a review of the authorities, a learned writer says:<sup>2</sup> "The family relation is obviously a relation of *status*, and not of *contract* merely. An assemblage of persons held together by a mere contract, other than the marriage contract, although such a contract may raise a duty of support on the part of one member, and create a state of dependence on the part of the others, is not a family. Of such a nature are the ordinary contracts of service now in vogue in the United States. And, hence, the relation of master and servant, or more properly speaking, of employer and employé, as it ordinarily exists in this country, does not constitute a *family*. 'There is absent that peculiar feature, which can be better understood than described, which distinguishes the family even from those who may dwell within the limits of the same curtilage.' And, therefore, a single man, who has no other persons living with him than servants and employés is not the head of a fam-

<sup>1</sup> Law Dic. tit. Family.

<sup>2</sup> Thompson on Homesteads, § 47.

ily within the meaning of the statutes creating homestead exemptions." In questions involving both the construction of wills and homestead rights the courts are inclined to adopt liberal views. In testing the right of a debtor to be considered the "head of a family" certain tests are applied which are easily understood. The first of these is whether the law imposed upon the head of the associated persons the duty of supporting them, which would be a simple and uniform test, but this test would not apply to all cases, consequently there is the further inquiry whether a moral duty to support existed. There is the test of condition of dependence and also those of common residence and good faith. In applying these tests and in construing who are included in the family of any person, the courts will be liberal.<sup>1</sup> Accordingly it has been held that indigent mother and sisters who live with a man and are supported by him are members of his family;<sup>2</sup> and a widowed daughter and her minor child residing with a father who was a widower are members of his family;<sup>3</sup> also dependent mother and dependent minor brothers and sisters residing with an unmarried man are members of his family;<sup>4</sup> so also minor brothers and sisters residing with an unmarried man;<sup>5</sup> also a widowed sister supported by a brother, whether she has or has not dependent children.<sup>6</sup> Children of a wife by a former husband are members of the husband's family<sup>7</sup> and adopted children.<sup>8</sup> The Supreme Court of Massachusetts has held<sup>9</sup> that, under the statute of that State, limiting

<sup>1</sup> Thompson on Homesteads, § 4.

<sup>2</sup> Marsh v. Lazenby, 41 Ga. 153.

<sup>3</sup> Blackwell v. Broughton, 56 Ga. 390; Cox v. Stafford, 14 How. Pr. 521.

<sup>4</sup> Connaughton v. Sands, 32 Wis. 387.

<sup>5</sup> Greenwood v. Maddox, 27 Ark. 658.

<sup>6</sup> Wade v. Jones, 20 Mo. 75; Bailey v. Cummings, cited Thompson on Homesteads, § 59.

<sup>7</sup> Allen v. Manasse, 4 Ala. 554; Sallee v. Waters, 17 Ala. 488.

<sup>8</sup> Thompson on Homesteads, § 48.

<sup>9</sup> Elsey v. Odd-fellows' Mut. R. Ass., 142 Mass. 224.

beneficiaries to the widow, orphans or dependents of deceased members, the mother, who was living with her husband away from a son was not a "dependent" upon him, nor strictly speaking a member of the son's family in the sense of being dependent. In a Michigan case<sup>1</sup> the Supreme Court of that State said: "Now this word 'family,' contained in the statute, is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife having no children and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body." The court therefore held that, where the insured was an old man and his beneficiary a young woman, who was not related to him, but who had lived for many years with him in the same household and was treated by him as a daughter, the term, family, as used in the statute covered the case and included her. In construing wills the word family is very comprehensive and, in its ordinary sense, comprises the same persons as "kindred" or "relations."<sup>2</sup> In some of the older cases bequests to one's family have been held void for uncertainty.<sup>3</sup> It was said by Romillo, M. R.,<sup>4</sup> that the primary meaning of family is children, and that there must be some circumstances arising on the will itself, or from the situation of the parties to prevent that construction.<sup>5</sup> Jessel, M. R., also said<sup>6</sup> that the primary meaning was children. And so in this country;<sup>7</sup> though ordinarily it includes the wife.<sup>8</sup> In the English cases, collected in the last edition of Jarman on Wills,<sup>9</sup> various

<sup>1</sup> *Carmichael v. N. W. Mut. Ben. Assn.*, 51 Mich. 494.

<sup>2</sup> 2 Williams on Exrs. 1213.

<sup>3</sup> 2 Jar. on Wills, chap. 29.

<sup>4</sup> *In re Terry's Will*, 19 Beav. 580.

<sup>5</sup> *Snow v. Teed*, 9 Eq. Cas. 622.

<sup>6</sup> *Pigg v. Clarke*, 3 Ch. D. 674.

<sup>7</sup> *Spencer v. Spencer*, 11 Paige, 159.

<sup>8</sup> *Bowditch v. Andrew*, 8 Allen, 339; *Bradlee v. Andrews*, 137 Mass. 50.

<sup>9</sup> Vol. II, p. 622 *et seq.*

meanings have been given to the word according to the supposed intent of the testator, as heir, or children, relations, descendants, or wife. As said by Vice Chancellor Kindersley in *Green v. Marsden*,<sup>1</sup> "family" is not a technical word, but is of flexible meaning. It has been held even to mean ancestors, and not infrequently next of kin, but often the parents have been excluded.<sup>2</sup> Judge Redfield, in his work on wills, says: <sup>3</sup> "There has been considerable controversy in the English courts in regard to the proper construction of bequests to the family of the testator, or of others. The state of things is so different in England, as it regards families, from what it is here, that the ordinary import of the word can scarcely be regarded the same. And the fact that so many cases, where the meaning of this term came in question, have arisen in the English courts upon the construction of wills, and so comparatively few in this country, leads us to the conjecture, that the word, family, will but seldom occur in a will, in this country, where there will not be something, either in other portions of the will or in the surrounding circumstances, which may lead to a reasonable ground of inferring, with probable certainty, the sense in which it was used by the testator." When used in the statutes in connection with other words, as where it says, "the families, widows, orphans, or other dependents of the deceased members," <sup>4</sup> it may include those not embraced in any of the other classes <sup>5</sup> and, therefore, was probably used in the larger sense of kindred or relations.<sup>6</sup>

§ 257. Children. — Where the word "children," as well as all other descriptive names of classes or relations,

<sup>1</sup> 1 Drew. 651.

<sup>2</sup> 2 Redf. on Wills, \*73.

<sup>3</sup> 2 Redf. on Wills, 71.

<sup>4</sup> Rev. Stat. of Mo. 1879, § 972.

<sup>5</sup> *Grand Lodge v. Elsner*, 26 Mo. App. 116.

<sup>6</sup> *Carmichael v. N. W. Mut. Ben. Assn.*, 51 Mich. 494.

is used it must always, when that can be done, be understood in its primary and ordinary signification,<sup>1</sup> and where the word has received a larger and more extended construction it has been based upon a supposed intention of a testator, grantor, or law-making power, to so extend it.<sup>2</sup> When there are those answering to the description, only legitimate children are included under the term,<sup>3</sup> but the authorities seem to agree that the question is one of intent, and if the term "children" is used by a testator who leaves one legitimate and one illegitimate child, both will generally take;<sup>4</sup> so, if an unmarried man leaves children who have been recognized by him, they will take.<sup>5</sup> Step-children will take if such can be supposed to have been intended. Also children by different marriages,<sup>6</sup> and posthumous children,<sup>7</sup> and adopted children,<sup>8</sup> but the right of the latter depends upon whether the child was legally adopted and whether there was an intent that it should take. In a case where a policy of life insurance on the life of a husband was payable "to my wife M. and children," the court held that a child of the insured by a former wife was included.<sup>9</sup> and it has been held that "children" means children of the assured by several wives, but not children of a wife by another husband.<sup>10</sup> Ordinarily, the word, child, does not include a grandchild,<sup>11</sup> but the general rule is, that whether

<sup>1</sup> 2 Redf. on Wills, \*15; Bedford's Appeal, 40 Pa. St. 18.

<sup>2</sup> 2 Redf. on Wills, \*16 and note; Wigram on Extrinsic Evidence, 42.

<sup>3</sup> Van Voorhis v. Brintnall, 23 Hun, 260.

<sup>4</sup> 2 Redf. on Wills, \*24 and cases cited in note.

<sup>5</sup> 2 Redf. on Wills, \*25.

<sup>6</sup> 2 Redf. on Wills, \*29; Jackman v. Nelson (Mass.), 17 N. E. Rep. 529; 6 N. Eng. R. 615.

<sup>7</sup> 4 Kent Comm. 412; 2 Washb. on Real Prop. 654; 2 Redf. on Wills, \*10.

<sup>8</sup> Barnes v. Allen, 25 Ind. 222.

<sup>9</sup> McDermott v. Centennial M. L. Ins. Assn., 24 Mo. App. 73; see also Jackman v. Nelson, *supra*.

<sup>10</sup> Koehler v. Centennial M. L. Ins. Co., 66 Ia. 325.

<sup>11</sup> Churchill v. Churchill, 2 Met. (Ky.) 469; Hughes v. Hughes, 12 B.

grandchildren will take under the term children, depends entirely upon the construction of the intent of the party using the word. A leading English case<sup>1</sup> says: "Children may mean grandchildren when there can be no other construction, but not otherwise." The late American cases are apparently conflicting, but seem to agree that the question is one of intent, depending upon the special circumstances of each case.<sup>2</sup> The Court of Appeals of Kentucky has held,<sup>3</sup> that under the circumstances of that case any other construction would defeat the intention of the maker of the instrument, and that, there at least, the words, child and grandchild, were synonymous. In a Rhode Island case,<sup>4</sup> the Supreme Court held the opposite. In a case where the policy was payable to the wife of the assured, if she survived him, and if not, then to his "children," it was held,<sup>5</sup> that grandchildren were not included. In another case,<sup>6</sup> where the policy was payable to the wife of assured "and children," the same court held that parol evidence was not admissible to show that a grandchild was intended to be included. The word, in a statute, has been construed to embrace grandchildren.<sup>7</sup> Obviously, rather than admit a construction that would result in intestacy, children would be held to mean descendants;<sup>8</sup> but there must be special and satisfactory reasons to justify a departure from the primary import of the word;<sup>9</sup> the rule, however, is not

Mon. 121; *Carson v. Carson*, 1 Phill. Eq. 57; *Robinson v. Hardcastle*, 2 Br. Ch. C. 344; *In re Cashman*, 3 Demarest (N. Y.), 242.

<sup>1</sup> *Reeves v. Brymer*, 4 Ves. 692-698.

<sup>2</sup> *Castner's Appeal*, 88 Pa. St. 478.

<sup>3</sup> *Duvall v. Goodson*, 79 Ky. 224.

<sup>4</sup> *Winsor v. Odd-fellows' Assn.*, 13 R. I. 149.

<sup>5</sup> *Continental L. Ins. Co. v. Webb*, 54 Ala. 688.

<sup>6</sup> *Russell v. Russell*, 64 Ala. 500.

<sup>7</sup> *Cutting v. Cutting*, 6 Sawy. C. C. 396; *Walton v. Cotton*, 19 How. 355.

<sup>8</sup> *Royle v. Hamilton*, 4 Ves. 437; *Radcliffe v. Buckley*, 10 Ves. 195; *Beebe v. Estabrook*, 79 N. Y. 246.

<sup>9</sup> *Jackson v. Staats*, 11 Johns. 337; *Hallowell v. Phipps*, 2 Whart. 376; *Feit v. Vanata*, 21 N. J. Eq. 84; *Scott v. Guernsey*, 48 N. Y. 106.



general.<sup>1</sup> Often, in order to carry out a supposed intention, children may mean issue generally.<sup>2</sup> All the persons who come within the designation and are in existence at the time the bequest or designation takes effect, will take unless the language used clearly conveys a different import.<sup>3</sup> A benefit certificate takes effect, so far as to vest in the beneficiaries an absolute right to the benefit money, at the death of the party to whom it is issued, and hence the same rules should hold to them which prevails as to wills and policies of life insurance. Where the certificate was issued payable to the "children" of the applicant without naming them, the term does not mean certain named children then in existence, but those together with such as may thereafter be born to the member.<sup>4</sup> They will take an equal share *per capita*, but if there are not words indicating a purpose to have the bequest or benefit go in shares, it will be so construed and the several classes will take *per stirpes*.<sup>5</sup> Under the Illinois statute abolishing distinctions between the kindred of the whole and the half blood, the Supreme Court of that State has held,<sup>6</sup> children of the same mother by different fathers are as much brothers and sisters as children of the same father by different mothers.

<sup>1</sup> Thompson v. Ludington, 104 Mass. 193.

<sup>2</sup> 2 Redf. on Wills, \*22, 23; Prowitt v. Rodman, 37 N. Y. 42; Churchill v. Churchill, 2 Metc. (Ky.) 466; Bond's Appeal, 31 Conn. 183; Collins v. Hoxie, 9 Paige, 81; Hone v. Van Schaick, 3 N. Y. 538; Dickenson v. Lee, 4 Watts, 82. But see Hopson v. Commonwealth, 7 Bush, 644.

<sup>3</sup> 2 Redf. on Wills, § 2, chap. I., part II.; Chesmar v. Bucken, 37 N. J. Eq. 415; Campbell v. Rawdon, 18 N. Y. 412; Felix v. Grand Lodge, etc., 31 Kan. 81.

<sup>4</sup> Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703; Union Mut. Aid Assn. v. Montgomery (Mich.), 38 N. W. Rep. 588; 14 West. Rep. 877.

<sup>5</sup> Hallan v. Gardner, 5 Ky. L. Rep. 857; Covenant Mut. Ben. Assn. v. Hoffman, 110 Ill. 603; Malone v. Majors, 8 Humph. 577; 2 Redf. on Wills, \*34; Harris' Estate, 74 Pa. St. 452; Kean v. Roe, 2 Harr. (Del.) 103; Morgan v. Pettitt, 3 Demarest (N. Y.), 61; Campbell v. Wiggins, Rice (S. C.) Ch. 10; Lemacks v. Glover, 1 Rich. Eq. 150.

<sup>6</sup> Oglesby Coal Co. v. Pasco, 79 Ill. 164.

§ 258. **Orphans.** — In the statutes of Massachusetts, Missouri and other States relative to benefit associations and in the charters of many societies, the benefits are expressed to be, among other classes, for “orphans” of deceased members. An orphan is defined to be a minor or infant child, who has lost both of his or her parents. Sometimes the term is applied to a person who has lost only one of his or her parents.<sup>1</sup> Webster’s dictionary defines the noun orphan substantially as Bouvier, but the adjective as “bereaved of parents.” The English authorities usually cited,<sup>2</sup> and at least one American case,<sup>3</sup> substantially support this definition. In a Pennsylvania case involving the construction of the word in Girard’s will,<sup>4</sup> the subject received exhaustive discussion, the conclusion being that a fatherless child was an orphan as well as a child who had lost both parents. The most reasonable view of the subject is that in the use of the word in connection with benefit societies, the orphans of a member are his children for, although a member’s children cannot be orphans so long as he lives, his orphans must certainly be his children. But in a Missouri case<sup>5</sup> it was held, from consideration of the rules of the association, that in that case, the true construction demanded that the term, “orphan children,” be taken as intended to mean minor children and not fatherless adults.

§ 259. **Widow.** — By “widow” we are undoubtedly to understand an unmarried woman whose husband is dead,<sup>6</sup> and that the word is used in its ordinary popular sense.

<sup>1</sup> Bouvier’s Law Dic., tit. “Orphan.”

<sup>2</sup> 2 Salk. 426; 2 Bl. Com. 519; 4 Burns Ecc. Law, 443-444; 7 Vin. Abr. 213; 1 McPherson on Inf. 54.

<sup>3</sup> Heiss, Exr., etc., v. Murphey et al., 40 Wis. 276.

<sup>4</sup> Soohan v. City of Philadelphia et al., 33 Pa. St. 9.

<sup>5</sup> Hammerstein v. Parsons, 29 Mo. App. 509.

<sup>6</sup> Bouvier’s Law D., tit. Widow.

An interesting case was recently decided by the Supreme Court of Maine <sup>1</sup> where the facts were as follows: Bolton insured his life in two societies to a considerable amount payable to his widow; he then living with a woman who for many years had passed as his wife. Upon his death the money passed to this supposed widow but, afterwards the true widow appeared and sued the pretender for this insurance money. The court decided in the claimant's favor holding that there could be but one widow of a man. Under this rule a divorced woman whose husband is dead is not his widow. In a New York case it was held <sup>2</sup> that the term wife after the name of a woman who was not the wife of the member will not invalidate the designation of her as his beneficiary. Nor does adultery affect the widow's right.<sup>3</sup> If a man designate as his beneficiary a woman with whom he is living as his wife the designation will be held good, although he may not in fact have been legally married to the woman, because if there be no violation of the laws of the society in the designation, the society by the issue of the certificate assents to such designation.<sup>4</sup> But, where the by-laws of the society designate the widow of a deceased member as the party to whom the benefit is to be paid, it has been held <sup>5</sup> that in the absence of qualifying circumstances the lawful wife of the member is intended, although it is legally possible for such member to designate as his beneficiary a person living with him as his wife, though not legally married to him, and if such designation is assented to and becomes a part of the contract, the person so designated may, on the member's death, recover on the contract, though the burden of proof is on her clearly to establish such designation. But in such a case the proof

<sup>1</sup> Bolton v. Bolton, 73 Me. 299.

<sup>2</sup> Durian v. Central Verein, 7 Daly, 168.

<sup>3</sup> Shamrock Ben. Soc. v. Drum, 1 Mo. App. 320.

<sup>4</sup> Story v. Williamsburg Masonic, etc., Assn., 95 N. Y. 474.

<sup>5</sup> Schnook v. Independent Order, etc., 21 Jones & Sp. 181.

must be clear, for courts will not encourage concubinage, and no right of a lawful wife or child will be permitted to be taken away except upon clear proof. In a case in Missouri<sup>1</sup> where the laws of the order designated the widow of the member as his beneficiary, the deceased had abandoned his wife in a foreign country and had lived in Missouri many years with a woman who was held out to be his wife and by whom he had reared a large family. The court held, on a contest between the lawful and the alleged widow, that the former was entitled to the benefit and the intention of the member in effecting the insurance and the good faith of the putative wife in considering herself his wife were immaterial facts.

§ 260. **Heirs.**—In construing the meaning of the word heirs the intent will also be considered and regarded, if possible;<sup>2</sup> and if there is a plain demonstration that the word was used in any other than a strict legal sense a liberal interpretation will be given it.<sup>3</sup> Accordingly it has been held to have been used in the sense of family,<sup>4</sup> and in the sense of children.<sup>5</sup> The general current of authority is to the effect that when applied to the succession of personal estate the words mean next of kin and a husband or widow are excluded.<sup>6</sup> There are numerous cases in opposition to this

<sup>1</sup> *Grand Lodge v. Elsner*, 26 Mo. App. 108.

<sup>2</sup> *Tillman v. Davis et al.*, 95 N. Y. 17; *s. c.* 47 Am. Rep. 1; *Criswell v. Grumbling*, 107 Pa. St. 408; *Bradlee v. Andrews*, 137 Mass. 50; *Greenwood v. Murray*, 28 Minn. 120; *Addison v. N. E. C. Travelers' Assn.* 144 Mass. 591; 12 N. East. Rep. 407; 4 New Eng. Rep. 639; *Sweet v. Dutton*, 109 Mass. 591; *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524. *In re Rootes*, 1 Drew & Sm. 228.

<sup>3</sup> *Rivard v. Gisenhof*, 35 Hun, 247; *Addison v. N. E. C. Trav. Assn.*, 144 Mass. 591; 12 N. East. Rep. 407; 4 N. Eng. Rep. 639.

<sup>4</sup> *Bradlee v. Andrews*, 137 Mass. 50; *Rivard v. Gisenhof*, 35 Hun, 247; *Criswell v. Grumbling*, 107 Pa. St. 408; *Brown v. Harmon*, 73 Ind. 412.

<sup>5</sup> *Morton v. Barrett*, 22 Me. 257; *Mace v. Cushman*, 45 Me. 250.

<sup>6</sup> *Hodge's Appeal*, 8 W. N. C. (Pa.), 209; *Hascall v. Cox*, 49 Mich.

view, which hold that by heirs those are meant who would take personal property under the statutes of distribution.<sup>1</sup> In an Illinois case the Supreme Court of that State,<sup>2</sup> held that the designation "legal heirs" in a benefit certificate gave the money to the next of kin and excluded the widow. In a case in Missouri<sup>3</sup> "heirs or representatives" was held to mean next of kin, if the intent of the assured could be shown to be that the money was not to go to his executors or administrators to be administered as ordinary assets. The Supreme Court of Massachusetts has held<sup>4</sup> that the word "heirs" was used in the by-laws of a benefit society "in its limited sense, to designate such persons as would be the legal heirs or distributees of the member at the time of his application or designation. This view is strengthened by the fact that, in the fourth clause of the same section, the same words are used in this sense, it being provided that, 'if the designator leave no widow, or children, or assignee, then it shall be payable to his heirs.' In the case at bar, W., in his application for membership, designated his wife as the person to whom the benefit was to be paid upon his death. At a later day he attempted to change the designation from his wife to his mother. It is agreed that

435; *Irwin's Appeal*, 106 Pa. St. 176; 51 Am. Rep. 516; *Tillmah v. Davis et al.*, 95 N. Y. 17; s. c. 47 Am. Rep. 1; *Wright v. Trustees*, Hoff. Ch. 202; *Keteltas v. Keteltas*, 72 N. Y. 312; *Luce v. Dunham*, 69 N. Y. 36; *Dodge's Appeal*, 106 Pa. St. 216; s. c. 51 Am. Rep. 519; *Blackman v. Wadsworth*, 65 Ia. 80; *Wilkins v. Ordway*, 59 N. H. 378; s. c. 47 Am. Rep. 215; *Gordon v. Small*, 53 Md. 550.

<sup>1</sup> *Withy v. Mangles*, 10 Clark & Fin. 215; *Evans v. Salt*, 6 Beav. 266; *Jacobs v. Jacobs*, 16 Beav. 557; *Low v. Smith*, 2 Jur. Pt. 1,344; *Doody v. Higgins*, 2 Kay & J. 729; *Elmsley v. Young*, 2 Myl. & K. 82; *In re Porter's Will*, 6 W. R. 187; *Gittings v. McDermott*, 2 Myl. & K. 69; *Eby's Appeal*, 84 Pa. St. 241; *Sweet v. Dutton*, 109 Mass. 591; *Welsh v. Crater*, 32 N. J. Eq. 177; *Freeman v. Knight*, 2 Ired. Eq. 72; *Alexander v. Wallace*, 8 Lea, 569; *Houghton v. Kendall*, 7 Allen, 72.

<sup>2</sup> *Gauch v. St. Louis M. L. I. Co.*, 88 Ill. 251.

<sup>3</sup> *Loos v. John Hancock L. Ins. Co.*, 41 Mo. 538.

<sup>4</sup> *Elsev v. Odd-fellows, etc.*, 142 Mass. 224.

his mother was not living with him, but was living with her husband in another town and county. It was not suggested that she was dependent upon him. She was not one of those who would be his heirs, and she was not one of the 'members of the decedent's family,' within the meaning of the by-law." In another case, however,<sup>1</sup> the mother of deceased, under the special facts in the case, was held to be a dependent. In another, heirs was held to mean widow.<sup>2</sup> The widow of a member of a mutual benefit association is the beneficiary under a certificate issued by it which is payable to "his heirs," he having brothers and sisters but no children.<sup>3</sup> The Supreme Court of Ohio has held that it is not within the power of a member of a benefit society to try to make one who is not related to him his beneficiary and heir within the statute limiting beneficiaries to the families of heirs of members.<sup>4</sup> Under the general rules and the statutes, in most States governing such cases of legacies to a class, heirs would take *per stirpes*.<sup>5</sup>

§ 260a. **Relatives.**—In the Massachusetts statute and in the charters of some benefit societies the word "relatives" is used. This term undoubtedly is synonymous with relations or kindred,<sup>6</sup> and is to be construed accordingly. It has long been settled that the word, relatives, when used in a will or statute, includes those persons who are next of kin under the statutes of distribution, unless from the nature of the bequest or from the testator having authorized a power of selection, a different construction is

<sup>1</sup> *Am. Legion of Honor v. Perry*, 140 Mass. 580.

<sup>2</sup> *Addison v. N. E. C. Travelers' Assn.*, 144 Mass. 591; 12 N. East. Rep. 407; *Kaiser v. Kaiser*, 13 Daly, 522.

<sup>3</sup> *Jamieson v. Knight's Templar, etc., Assn.*, 12 Cin. L. Bul. 272 (Superior Ct. Cin.).

<sup>4</sup> *National Aid Assn. v. Gonser*, 43 Ohio St. 1.

<sup>5</sup> 2 Redf. on Wills, \*34; *Burgin v. Patton*, 5 Jones Eq. (N. C.) 425; *Gosling v. Caldwell*, 1 Lea (Tenn.), 454; *Conigland v. Smith*, 79 N. C. 303.

<sup>6</sup> *Bouvier Law Dic.*, tit. "Relative."

allowed.<sup>1</sup> In the construction of a statute it has been held not to include a stepson<sup>2</sup> nor a wife.<sup>3</sup> In this latter case the court said: "There seems to be no authority for holding that the word relation, in its strict legal and technical sense, includes husband or wife. On the contrary, authorities are found very direct and explicit to the point that they are not relations. Thus in 2 Williams on Executors,<sup>4</sup> it is laid down that 'no person can regularly answer the description of relations but those who are akin to the testator by blood: A wife, therefore, cannot claim under a bequest to her husband's relations nor a husband as a relation to his wife.' " The Supreme Court of Pennsylvania<sup>5</sup> has decided that in a will the terms, "my nearest relations or connections" do not include the testator's wife. The decision says: "A wife is no more a relation of her husband than he is of himself." The English rule is the same.<sup>6</sup> The word "relations" includes only relations by blood and not connections by marriage, even a husband or wife.<sup>7</sup>

§ 261. Dependents.—The statutes of the various States, and a majority of the charters of the leading benefit associations, restrict the payment of benefits, among other classes, to the "dependents" of the member, or "those dependent on him." In the discussion of the meaning of this word "dependents" we have not the benefit of a series of judicial decisions extending over many years, for the

<sup>1</sup> Drew v. Wakefield, 54 Me. 291; 2 Jarm. on Wills, 661; Bouvier's Law Dic., tit. "Relative."

<sup>2</sup> Kimball v. Story, 108 Mass. 382.

<sup>3</sup> Esty Admr. v. Clark et al., 101 Mass. 36.

<sup>4</sup> p. 1004.

<sup>5</sup> Storer v. Wheatley, 1 Pa. St. 506.

<sup>6</sup> Garrick v. Lord Camden, 14 Ves. 372.

<sup>7</sup> Paine v. Prentiss, 5 Met. 396; Esty v. Clark, 101 Mass. 36; Dickinson v. Purvis, 8 S. & R. 71; Kimball v. Story, 108 Mass. 382.

point has not often arisen; but the only cases bearing directly on the subject will be referred to in the course of this inquiry. Webster's Dictionary defines the word primarily to mean, "One who depends; one who is sustained by another, or who relies on another for support or favor; a retainer; as a numerous train of *dependents*." In cases arising under the homestead and exemption laws, the courts have, with scarcely an exception, held that hired servants are not members of a family within the meaning of those laws.<sup>1</sup> Following the analogy of these precedents we must conclude that "retainers" or servants are not to be classed among dependents, nor is any person whose relation to the testator is fixed by contract and not by *situs*, except, of course, husband and wife, who undoubtedly are dependents each upon the other. We must logically exclude also those whose dependence upon the member is for favor, which may or may not take a pecuniary form, and which may be cast off at pleasure. Evidently, to bring a person within the circle of dependents, there must be some more substantial and open reliance, and yet we can easily conceive of cases where a state of dependency may be actual, although no legal nor moral duty rests upon the member to give aid or support to the dependent. Under the definition, three classes are left, and even these have no well-defined limits, or bounds of separation; so that all persons can be segregated into one or the other division. "One who depends," — what is included in this definition? We are all more or less dependent on each other, and so are dependents, yet none can affirm that all the world is included in the class named in the charters or statutes. "One who is sustained by another, or who relies on another for support." Taking this definition as a whole, we are forced to the conclusion that they limit the term dependents to those who reasonably rely upon another for subsistence, nourishment and support. In a

<sup>1</sup> Thompson on Homesteads, etc., §§ 45-47.



Wisconsin case,<sup>1</sup> the Supreme Court defined dependent as follows: "We think the true meaning of the word 'dependent,' in this connection, means some person or persons dependent for support in some way upon the deceased." This definition has been cited and seemingly approved by the Supreme Court of Massachusetts,<sup>2</sup> which held, under the special facts in the case, that the betrothed of the member was not a dependent upon him, nor was his sister, nor a sister of his deceased wife. In another Massachusetts case,<sup>3</sup> a mother was not claimed to be a dependent. The question has also arisen in Missouri, where the statute<sup>4</sup> authorizes certain benevolent corporations to provide by assessments on their members certain benefits for "the relief and aid of the families, widows, orphans or other dependents" of the deceased members. In construing this section the St. Louis Court of Appeals says:<sup>5</sup> "Counsel for the appellant argues that section 972 contains a limitation of power, and, as the provision is for 'relief and aid,' the beneficiary must not only be a member of the family, or a widow, or orphan of the deceased member, but also must have lived dependent upon him for support. There is no warrant for this construction. The words 'other dependents,' are inserted to include persons, who, not being either members of the family of the deceased, nor his widow or orphans, are yet dependent upon him in some manner. Any other construction would require the court in each case to enter into an investigation of the fact how far the widow or orphans, or any other member of the family, was self-supporting; which, in itself, instead of furthering the objects of these associations, would soon encompass their complete destruction. This is in accord with the construction placed upon

<sup>1</sup> Ballou v. Gile, 50 Wis. 614.

<sup>2</sup> American Legion of Honor v. Perry, 140 Mass. 580

<sup>3</sup> Elsey v. Odd-fellows, etc., 142 Mass. 224.

<sup>4</sup> § 972, Rev. Stat. 1879.

<sup>5</sup> Grand Lodge v. Elsner, 26 Mo. App. 116.

the statute by the Supreme Court of Michigan in *Supreme Lodge v. Nairn*,<sup>1</sup> where it is held: 'The laws of that State (Missouri) expressly forbid corporations of this sort from paying benefits to any but the member's family or dependents. The intent of the prohibition is clearly to shut out all persons who are not actual relatives, or standing in place of relatives in some permanent way, or in some actual dependence on the member.''' From the definition and cases cited it seems that whether or not a person is included among the dependents of a member of a benefit society is a question of fact, and that each case must be decided upon its own merits. In accordance with the liberal view of the Supreme Court of Michigan,<sup>2</sup> in defining who are included in the term family, we should say that if any person, relative of the member or not, was supported by him, directly or indirectly, or wholly or in part, at his home or abroad, because of a legal or moral obligation, or merely from affection, such person might be called a dependent and be designated as the beneficiary of such member. But in all cases it would appear essential to apply the test of good faith, for mere capricious liking or temporary liberality in the way of gifts would not make the recipient a dependent.<sup>3</sup> A person whose only relation to the deceased member is that of a creditor, is not a person dependent upon him, within the meaning of the statutes authorizing the organization of societies to pay benefits to the families, *dependents*, etc., of deceased members, and a promise by the association to pay such a creditor is void. It has been said: <sup>4</sup> "Such a promise is beyond the powers of the association, and contravenes the intention of the statutes under which the asso-

<sup>1</sup> 60 Mich. 44.

<sup>2</sup> *Carmichael v. N. W. Mut. Ben. Assn.*, 51 Mich. 494.

<sup>3</sup> *Thompson on Homesteads*, § 50; *Seaton v. Marshall*, 6 Bush, 429; *Marsh v. Lazenby*, 41 Ga. 153.

<sup>4</sup> *Skillings v. Mass. Benefit Assn. (Mass.)*, 15 N. East. Rep. 566; 5 N. Eng. Rep. 718.

ciation was organized. The plaintiff cannot, therefore, maintain an action on this promise either for his own use, or for that of any other person.”<sup>1</sup>

§ 262. **Legal Representatives: Devisee: Legatee.** — We may group under one heading the remaining terms most commonly used in describing the classes among whom the designation of beneficiaries must be made. “Legal representatives” is perhaps the most important of these. In construing the meaning of this word, as employed in a statute forbidding the use in business by any person of the name of any one formerly connected with him in partnership without the consent of such person so formerly connected, or his legal representatives, the Supreme Court of Massachusetts held<sup>2</sup> as follows: “There can be no doubt that the ordinary meaning of the term ‘legal representatives’ is executors and administrators.”<sup>3</sup> In wills, the term may mean whatever the testator intended; but, if the meaning is not controlled by the context, it means executors or administrators.<sup>4</sup> In the construction of statutes, technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in the law, are to be construed and understood according to such peculiar and appropriate meaning, unless such construction would be inconsistent with the manifest intent of the legislature, or repugnant to the context of the same statute. Accordingly, in a particular statute this term was held to include heirs.<sup>5</sup> Looking at the legislation now before us for construction nothing is found to change the ordinary

<sup>1</sup> *Rice v. New England M. A. Soc. (Mass.)*, 5 N. Eng. Rep. 813; 15 N. E. Rep. 624; *Briggs v. Earl*, 139 Mass. 473; 1 N. East. Rep. 847; *Am. Legion of Honor v. Perry*, 140 Mass. 580; 5 N. East. Rep. 634; 1 N. Eng. Rep. 715.

<sup>2</sup> *Lodge v. Weld*, 139 Mass. 499.

<sup>3</sup> *Cox v. Curwen*, 118 Mass. 198; *Price v. Strange*, 6 Madd. 159.

<sup>4</sup> 2 *Williams on Ex.* 1216-1220.

<sup>5</sup> *Johnson v. Ames*, 11 Pick. 173, 180.

meaning of the term." It may mean a widow or children who are legal representatives in the contemplation of the charter and by-laws.<sup>1</sup> "Devisee" is one to whom a devise, *i.e.*, a gift of realty, is given by a will, and "legatee" is one to whom a legacy, *i.e.*, a gift of personalty, is given by a will,<sup>2</sup> but in construing these terms the courts are inclined to search for the intent of the instrument maker.<sup>3</sup> In one case<sup>4</sup> the designation was "to his devisees, as provided in last will and testament, or, in event of their prior death, to the legal heir or devisees of certificate holder," and the member died intestate. In proceedings brought in equity to recover, the court held these words to be equivalent to a promise to pay to the devisees, if there should be any, and if not then to his heirs.<sup>5</sup>

§ 263. **Ambiguous Designation:** "Estate."—If the name of the person, for whose benefit the insurance is obtained, does not appear upon the face of the certificate or policy, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, so that it cannot be understood without explanation, extrinsic evidence may be resorted to, to ascertain the meaning of the contract; and when thus ascertained it will be held to apply to the interests intended to be covered by it, and they will be deemed to be comprehended within it who were in the mind of the parties when the contract was made.<sup>6</sup> So, where the agent was told that the insurance was desired for the benefit of the widow and heirs of Daniel

<sup>1</sup> *Masonic Mut. Relief A. v. McAuley*, 2 Mackey, 70.

<sup>2</sup> *Bouvier's Law Dict.*, tit. "Devisee," "Legatee."

<sup>3</sup> *Lodge v. Weld*, 139 Mass. 499.

<sup>4</sup> *Covenant Mut. Benefit Assn. v. Sears*, 114 Ill. 108.

<sup>5</sup> *Smith v. Covenant Mut. Ben. Assn.*, 24 Fed. Rep. 685.

<sup>6</sup> 1 Phil. on Ins. 163; *Colpoys v. Colpoys*, Jacob, 451; *Burrows v. Turner*, 24 Wend. 277; *Davis v. Boardman*, 12 Mass. 80; *Newson's Admrs. v. Douglass*, 7 Harr. & J. 417; *Myers v. John Hancock Ins. Co.*, 41 Mo. 538; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

Ross and the policy was made payable to "the estate of Daniel Ross," the Court of Appeals of New York<sup>1</sup> held that the rule above given had direct application, as it is not essential that the person or persons assured should be named in the policy nor is that essential to the contract of insurance. In this case the court said: "It is insisted, however, that the words, 'estate of Daniel Ross' have a definite legal signification, meaning his administratrix, and that the policy is to be construed in the same manner as though she was named as the person assured thereby. This position has some support in the remark of Denio, C. J., in *Herkimer v. Rice*,<sup>2</sup> to the effect that in common parlance and in legal language, when the estate of a deceased person is spoken of, the reference is to his effects in the hands of his executor or administrator. In that case the question was as to the right of the administrator and the creditors of the intestate on the one side, and the heirs upon the other, to certain money recovered upon policies of insurance upon the buildings on the land of the intestate, issued directly to the administrator or renewed upon her (his?) application. The renewal receipts stated the premium to have been received of the estate of the intestate. In fact, the policies were renewed upon the application of and for the benefit of the administratrix and the creditors, and the court gave effect to the contract according to the intention of the parties." In a case decided by the Supreme Court of Florida,<sup>3</sup> the contract of life insurance described the beneficiary thereunder as "for the benefit of the estate of the insured," and it was held that under the circumstances of the case the terms referred to and meant for the benefit of an only minor child less than five years of age at the date of the contract, and not to the administrator or distributee of the estate. The court in its opinion said: "The term estate here in its

<sup>1</sup> *Clinton v. Hope Ins. Co.*, 45 N. Y. 461.

<sup>2</sup> 27 N. Y. 163.

<sup>3</sup> *Pace v. Pace*, 19 Fla. 438.

strict legal signification embraces neither the administrator, the heir or the creditor of the assured. It means the effects, personal and real, left by the decedent when given a signification with reference to a period subsequent to his death, and that is the date when the benefit was to accrue. Such literal legal signification would be absurd. The word benefit in a policy of insurance must be interpreted with reference to persons, not things. An insurance may be for the benefit of the person owning a house, not for the house. To benefit stocks and stores was not the intention of the parties. Without entering into any elaborate discussion of the subject we will simply state that the cases having a bearing upon the subject<sup>1</sup> show that these and similar terms, under the circumstances of this case, are so interpreted as to benefit the surviving members of the family rather than for the benefit of the creditor or administrator, and that in this instance the beneficiary intended was the infant child. In the interpretation of contracts of this character the courts go a great way in this direction. This, we think, would have been the construction of this policy, independent of the policy of the statute, which, as a matter of course, should have some effect in controlling our action in the matter.”<sup>2</sup> In a Massachusetts case,<sup>3</sup> the Supreme Court held that a designation by a member of a benefit society of “my estate” as the beneficiary, was illegal under the statutes of that State regulating benefit societies. In a Kentucky case,<sup>4</sup> the controversy was over a benefit promised to be paid by the National Mutual Benefit Association on the death of one Throckmorton. By the charter the benefits could be paid to the “legal heirs or beneficiary” of the member. Throckmorton designated “my estate” as the

<sup>1</sup> *Myers v. John Hancock Ins. Co.*, 41 Mo. 538; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Globe Ins. Co. v. Boyle*, 21 Ohio St. 119.

<sup>2</sup> See also *Eppinger v. Canepa*, 20 Fla. 262.

<sup>3</sup> *Daniels v. Pratt*, 143 Mass. 216.

<sup>4</sup> *Basye v. Adams*, 81 Ky. 363.

beneficiary, but afterwards assigned the certificate to Basye, his creditor, for the sum of \$500, the benefit being \$4,000. The court awarded the amount, less what Basye had paid, to the heirs on the ground that though the assignment was void because a wagering transaction, yet, as Basye's claim was the only one against the estate, it allowed it to be paid. The court said: "He (Throckmorton) designated his *estate* as his beneficiary, by which he clearly meant that the amount payable at his death should become assets of his estate, to be paid over to his personal representative, according to the laws providing for the distribution of estates of deceased persons, and payment of debts against them."

§ 264. **Several Beneficiaries, Construction.** — Where there are several beneficiaries named in a policy it has been held, as to insurance policies proper, that if one or more of them die before the assured, the benefit of the policy enures to the survivors, and so long as any of the beneficiaries are living the assured has no interest in the policy and cannot assign it.<sup>1</sup> And where a benefit certificate was payable to "Mrs. M. H. Case or lawful heirs," and it appeared that at the time the certificate was issued to the member he had a wife Amelia, named in the designation as Mrs. M. H. Case, who afterwards died leaving a daughter, Inez, and the member subsequently married and died leaving a widow Emma, it was held that when the wife, Amelia, died the designation lapsed as to her and as Inez was the only heir of the member the benefit went to her.<sup>2</sup> Under a certificate of a mutual aid society naming two beneficiaries, and providing that "in case of the death of either, full amount to go to the survivor — if living; if not living then to the heirs of said member," — upon the

<sup>1</sup> Robinson v. Duvall, 79 Ky. 83.

<sup>2</sup> Day v. Case, 43 Hun, 179.

death of the member, the beneficiaries both living, the shares of such beneficiaries vest in them, and if one dies before the payment of the benefit, his share goes to his executor, not to the survivor. In a case where the member had directed that the benefit be paid to a son and daughter, or the survivor of them, the money was payable ninety days after receipt of proofs of the death of the member and the son died after his father, but within the ninety days. The daughter claimed the entire fund on the ground that the period of survivorship related to the time of payment of the money, not to the time of death of the member. In awarding the son's share of the fund to his executor the court said: <sup>1</sup> "The scheme of the corporation is to raise a fund which shall pass to designated beneficiaries at the death of the member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary. He may compel the corporation to levy the assessment, if it refuses, after the time limited for payment. The provision relating to survivorship applies to the one of the two who shall survive the donor. If neither survive him, the fund goes to the heirs of the member. The time of payment provided for, namely ninety days after the death of the member, has no reference to who shall take as survivor. The time of payment is defined simply to enable the corporation to raise the fund by assessment upon the members. If the son, N. Lyon Franklin, had died before his father, Edward C., the whole sum would have been payable to the daughter, Charlotte A., and, if she had also died before her father the fund would have been payable to his heirs. The words 'if living,' and 'if not living' refer to living at the time of Edward C. Franklin's death." <sup>2</sup> If the constitu-

<sup>1</sup> Union Mut. Aid Assn. v. Montgomery, 38 N. W. Rep. 588; 14 West. Rep. 877.

<sup>2</sup> See Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703.



tion and by-laws of a benefit society provide that in default of a designation of a beneficiary by the member that the sum shall be paid to certain persons; as, for example to the widow, orphans, heirs, etc., the word, "or," will be understood between the names of these different classes and the fund in such case would go first to the widow, if there was one, if there was no widow, then to the orphans, or if there were no orphans or widow then to the heirs and so on.<sup>1</sup>

§ 265. **Incorporated and Unincorporated Benefit Societies: Ultra Vires.** — Whether a benefit society is incorporated or a mere voluntary association, it is believed that the laws governing the designation of beneficiary are the same. It is a question of construction of the contract, modified by statute, and the effect of non-compliance with the laws of the society or statute is to generally vitiate the designation. Whether or not an incorporated benefit society can invoke the doctrine of *ultra vires* to avoid a contract must depend upon the general rules of law applicable to corporations which we have already discussed.<sup>2</sup> There are authorities which hold that it is always lawful to set up such a defense, but of late years the courts seem to frown upon this action, especially when the contract has been executed as by the death of the person insured and the later rule is that, in an action upon a benefit certificate, the society will not be allowed to assert in defense that the designation of the beneficiary in the certificate was one of a class of persons not included in the enumeration, in the charter, of those for whom benefits were to be pro-

<sup>1</sup> Relief Assn. v. McAuley, 2 Mackey, 70; Kentucky Masonic Aid, etc., v. Miller's Admr. 13 Bush, 489; Addison v. N. E. C. Travelers' A-sn. 144 Mass. 591; 12 N. E. Rep. 407; Ballou v. Gile, 50 Wis. 614; Covenant M. B. A. v. Sears, 114 Ill. 108.

<sup>2</sup> *Ante*, § 47, et seq.

vided. This is especially the case when the society has been receiving the assessments on the policy with knowledge.<sup>1</sup>

<sup>1</sup> *Matt v. Roman Catholic Mut. Pro. Soc.*, 70 Ia. 455; 30 N. W. Rep. 799; *Lamont v. Hotel Men's Mut. Ben. Assn.*, 30 Fed. Rep. 817; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121; *Lamont v. Grand Lodge Ia. Leg. of Honor*, 31 Fed. Rep. 177; *Folmer's Appeal*, 87 Pa. St. 135; But see *Elsev v. Odd-fellows*, 142 Mass. 224; *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Mutual Ben. Assn. v. Hoyt*, 46 Mich. 473; *Knights of Honor v. Nairn*, 60 Mich. 44; *Rice v. N. Eng. M. A. Soc.*, 5 N. Eng. Rep. 813; 15 N. E. Rep. 624. The Supreme Court of Massachusetts is firm in holding these contracts *ultra vires* and void.

## CHAPTER VIII.

### CONSUMMATION OF CONTRACT: INCOMPLETE CONTRACTS: JURISDICTION OF EQUITY TO REFORM OR CANCEL.

- § 266. To Complete Contract of Insurance Negotiations must be Concluded.
267. Application must be Accepted to make a Contract.
268. Proposal may be withdrawn at any time before Acceptance.
269. If the Policy be Different from that Applied for it is not Binding upon the Company until Accepted by the Applicant.
270. Delay in Acting upon an Application will not Amount to Acceptance: Company not Bound to Accept.
271. Company may be Bound though Application has been Rejected or not Acted on.
272. When Contract of Insurance becomes Complete.
273. The Same Subject: Contract may be Complete without Delivery of the Policy.
274. Fraudulent Delivery of Policy.
275. After Contract is Complete Change in Risk Immaterial.
276. There may be a Conditional Delivery of Policy.
277. Unconditional Delivery of Policy by Agent in Violation of Instructions.
278. Court of Equity can Correct Mistakes in Insurance Policies.
279. Equity will Relieve if Agent has Acted in bad Faith.
280. Or if the Policy does not Conform to the Application.
281. Or if the Errors are Manifest.
282. Reasons for Refusal to Interfere.
283. No Relief when Legal effect of Plain Terms was Misunderstood.
284. Application of Foregoing Principles to Benefit Societies.
285. Jurisdiction of Equity to Decree Cancellation.
286. The Same Subject: Application to Benefit Societies.
287. The Same Subject: Cancellation after Loss.
288. General Doctrine as to Interference of Equity Stated.

§ 266. To Complete Contract of Insurance Negotiations must be Concluded. — We have seen <sup>1</sup> that the contract of insurance is the result of negotiations which are

<sup>1</sup> *Ante*, § 189, *et seq.*

generally conducted through the medium of agents. On the one side is the proposal, or application, of the insured, on the other is the acceptance of such offer by the insurer before there can be a complete contract. Various important and interesting questions arise as to when the contract is complete and at what point in the negotiations it becomes binding upon one side or the other. The business of life insurance companies, as now conducted in this country, is done in this way: an agent solicits the application, which, accompanied with the certificates of medical examination, of the referee, and of the agent, is sent to the company, whose immediate officers accept or reject it. If accepted a policy is forwarded to the agent, who countersigns it and delivers it on payment of the premium. The customs of the various companies are somewhat different, but their methods of doing business are substantially the same. Benefit societies pursue a somewhat similar course. In applying for membership, and the insurance incident thereto, the applicant sends his application to the officers of the local lodge, accompanied with the prescribed fee: he is examined by the lodge physician, and the papers are sent to the grand medical examiner, who approves or rejects. If approved the applicant is voted on by the lodge, and, if received, is initiated into membership, after which the grand or supreme lodge issues the certificate, which is countersigned by the officers of the local lodge and delivered. In different societies these processes are not always the same, nor are they always in the order stated, for often the member is not initiated until the grand lodge approves of the examination and issues the certificate. Generally, the course pursued is as first indicated. There is this difference between the methods of conducting the business of benefit societies and that of life insurance companies: the lodges have greater powers than the insurance agents. The lodge is the sole judge of the moral and social qualifications of the applicant, as the grand

or supreme lodge is the judge of his physical qualifications; the powers of insurance agents are limited. Subordinate lodges, like agents of life insurance companies, seldom have the authority to absolutely conclude a contract. Their powers are ordinarily confined to the procuring of applications for insurance without any right to make a binding agreement. In some cases, as when an agent represents a foreign company, the agents may have a qualified authority to make their contracts temporarily binding during the period necessary to transmit the application to the company, or the grand, or supreme, lodge officers, and receive a reply. But the usage that lodges, or agents, cannot conclude a contract is so general that if an exception is alleged there must be evidence of actual authority, or of the repeated exercise of the authority with the knowledge of the company. In the case of benefit societies the constitution and by-laws is the source of authority and in applying for membership the applicant will be presumed to have acquainted himself with their requirements and limitations of the authority of lodges.<sup>1</sup> Before the company, or society, can be held liable for the insurance applied for, the negotiations must have reached such a point that nothing remains for either party to do except to comply with its terms.<sup>2</sup>

**§ 267. Application Must be Accepted to Make a Contract.**—The application for insurance is a mere proposal on the part of the applicant.<sup>3</sup> When the insurer signifies his acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. This acceptance must be signified by some act, a simple mental

<sup>1</sup> *Supreme Lodge, etc., v. Grace*, 60 Tex. 569.

<sup>2</sup> *Connecticut Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Todd v. Piedmont & Arlington L. Ins. Co.*, 34 La. Ann. 63. As applied to revival of lapsed policy: *Diboll & Ema L. Ins. Co.*, 32 La. Ann. 179.

<sup>3</sup> *McCully v. Phoenix M. L. Ins. Co.*, 18 W. Va. 782; *Heiman v. Phoenix M. L. Ins. Co.*, 17 Minn. 157.

acceptance, a mere thought unexpressed, amounting to nothing.<sup>1</sup> This application must be in due form and signed by the applicant if the rules so require. As where the rules of a society required that the medical examination of an applicant and his application for a benefit certificate, which contained an agreement and warranty of the truth of the answers, be signed by him, which was not done, and no certificate was issued on that account, it was held that no liability resulted.<sup>2</sup> In this case, the court said: "The minds of the respective parties never met. There was no such mutual agreement and understanding of the matter between them as is essential in order to create the contract and give it binding force on both parties, under the rules and regulations by which the relations of the deceased to the appellant were governed." Where application was made to a benefit society in due form, and the agent received the papers and the applicant was examined by the medical examiner and gave his note for the first payment, but was killed before the note was paid or the application forwarded, it was held,<sup>3</sup> that until the application was approved by the company there was no contract. The court said: "The application in such cases is a mere proposal, and, until it is accepted, there can be no contract, for until that time the minds of the parties have not met. There is simply an offer on one side, which may be accepted or rejected by the other. There must be a meeting of the minds of the parties, in all cases, as to the whole subject and the substantial conditions of the whole contract, or there is obviously no contract."

**§ 268. Proposal may be Withdrawn at any Time before Acceptance.** — It follows that the applicant can, at any time

<sup>1</sup> Ala. Gold Life Ins. Co. v. Mayes, 61 Ala. 163; Heiman v. Phoenix Mut. L. Ins. Co., 17 Minn. 157; Tayloe v. Merch. F. Ins. Co., 9 How. 390.

<sup>2</sup> Supreme Lodge, etc., v. Grace, 60 Tex. 570.

<sup>3</sup> Covenant M. B. Assn. v. Conway, 10 Bradw. 348.

before the application is accepted, withdraw it, and, if he does so, is not bound to accept the policy.<sup>1</sup> The principle is that laid down in relation to all contracts,<sup>2</sup> that “the party making the promise is bound to do nothing unless the promisee, within a reasonable time, engages to do, or else does or begins to do, the thing which is the condition of the first promise. Until such engagement or doing, the promisor may withdraw his promise, because there is no mutuality, and, therefore, no consideration for it.”<sup>3</sup>

§ 269. If the Policy be Different from that Applied for, it is not Binding upon the Company until Accepted by the Applicant. — If the policy, issued by a company, is, in any particular, different from that applied for, it is not binding upon the company until it is accepted by the applicant. An interesting and important case determining this point was decided by the Supreme Court of the United States,<sup>4</sup> where the facts were these: The applicant, in due form, applied for a policy of life insurance, the premiums on which were to be paid quarterly, and gave his note for the amount of the first payment; the company accepted the risk, but changed the amount of the premium and antedated the policy. The agent received the policy and six days afterwards sent a communication of that fact to the assured, and asked him what he should do with it. It did not appear whether this communication was received by the assured or not, and he died a few days after it had been sent. Suit was brought on the policy, judgment rendered against the company in the Federal court, and an appeal was taken to the Supreme Court of the United States, which reversed the case, holding that, owing to the change in the terms of the policy from those contemplated by the appli-

<sup>1</sup> *Globe Mut. L. Ins. Co. v. Snell*, 19 Hun, 561.

<sup>2</sup> 1 Pars. on Con. 550.

<sup>3</sup> *Real Estate M. F. Ins. Co. v. Roessle*, 1 Gray, 336.

<sup>4</sup> *Insurance Co. v. Young*, 23 Wall. 85.

cant, the acceptance of the company was a qualified acceptance, which the applicant was not bound to accept, and that, in the absence of evidence of such acceptance, the company was not held by the policy. In its opinion, the court said: "The mutual assent, the meeting of the minds of both parties, is wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none. In this case it is not established by any direct proof and there is none from which it can be inferred. \* \* \* If he had received notice of the proposition made through the policy, it would have been at his option to give or refuse his assent. He was certainly in no wise bound until such assent was given. Until then there could be no contract on his part, and if there was none on his part, there could be none on the part of the company. The obligation in such cases is correlative. If there is none on one side, there is none on the other. The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority. As the applicant was never bound, the company was never bound." <sup>1</sup>

§ 270. **Delay in Acting upon an Application will no-Amount to Acceptance : Company not Bound to Accept.** — The company is not obliged to act at once upon the application. The fact that an application has been made for insurance, and a long time has elapsed, and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. There must be an actual acceptance, or there is no contract.<sup>2</sup> In a case where it was

<sup>1</sup> *Byrne v. Casey* (Tex.), 8 S. W. Rep. 38.

<sup>2</sup> *Haskin v. Agricultural F. Ins. Co.*, 78 Va. 707; *Markey v. Mut. Ben. Ins. Co.*, 103 Mass. 92; *Haden v. Farmer's & M. F. Ins. Co.*, 80 Va. 683. *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 523.



claimed that the delay of the company in acting upon the application was to be deemed a consent<sup>1</sup> the court said: "We are not aware of any authority for the proposition that mere delay — mere inaction, can amount to an acceptance of a proposal to enter into a contract. The opposite is the true doctrine, that if no answer is given to a proposition for a contract, within a reasonable time, the proposition is regarded as withdrawn. The principle is stated in *Hallock v. Commercial Ins. Co.*<sup>2</sup> that a contract arises when an overt act is done, intended to signify an acceptance of a proposition, whether such overt act comes to the knowledge of the proposer or not, and unless a proposition is withdrawn, it is considered as pending until accepted or rejected, provided the answer is given in a reasonable time. If the applicant was dilatory in acting on the proposal, the deceased could have quickened its diligence by demanding prompt action; or, if not assenting to the delay, he could have retracted his proposal, and reclaimed the money he had advanced and his note. He had no right, without an inquiry as to the cause, without any action on his part, to rely on the supineness of the appellant, no greater than his own, as an acceptance of the proposal."<sup>3</sup> The company is not bound to accept if no good cause for rejection exists.<sup>4</sup> If a mutual organization, the directors may be actuated by other considerations than the quality of the risk.<sup>5</sup> The company can reject the application, although part of the premium or all of it has been paid.<sup>6</sup> This doctrine applies

<sup>1</sup> *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163.

<sup>2</sup> 26 N. J. L. 263; 27 N. J. L. 645; 72 Am. Dec. 379.

<sup>3</sup> *Insurance Co. v. Johnson*, 23 Pa. St. 72; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421; *Flanders on Ins.* 108.

<sup>4</sup> *Ins. Co. v. Young*, 23 Wall. 85; *Ala. Gold Life Ins. Co. v. Mayes*, 61 Ala. 163. But see *post*, § 273, *Oliver v. Am. Legion of Honor*.

<sup>5</sup> *Harp v. Granger's Mut., etc., Ins. Co.*, 49 Md. 309.

<sup>6</sup> *Otterbein v. Ia. State Ins. Co.*, 57 Ia. 274; *Todd v. Piedmont & Arhington L. Ins. Co.*, 34 La. Ann. 63; *Supreme Lodge v. Grace*, 60 Tex. 569.

to mutual companies.<sup>1</sup> Where the application and premium were duly forwarded by mail, but the company never received them or heard of them, so that neither policy was issued nor money returned to the applicant as was provided in the receipt given by the agent, it was held that no contract existed.<sup>2</sup>

§ 271. **Company may be Bound though Application has been Rejected or not Acted on.** — But it is possible under some circumstances for the officers of a company to bind it, although in fact the application has been declined; as where the secretary and director of a mutual company took the applicant's application, premium note and note for cash premium and promised to notify him if the application was rejected and in that case to return the notes. The application was rejected. Seven months afterwards the applicant's premises were burned, but he had received no notice of the rejection of his application. In an action on the contract the plaintiff recovered and this judgment was affirmed by a divided court.<sup>3</sup> So, where on the organization of a company a large number of applications with premium notes were received, and, before the approval of one of them, but the next day after the formal organization, a loss occurred, it was held that the company was liable.<sup>4</sup>

§ 272. **When Contract of Insurance Becomes Complete.** — A contract of insurance never becomes complete until the last act necessary to be done by either party has in fact been done, although one side or the other may conditionally bind itself by a proposition which, when uncon-

<sup>1</sup> *Walker v. Farmer's Ins. Co.*, 51 Ia. 679; 2 N. W. Rep. 583; *Armstrong v. State Ins. Co.*, 61 Ia. 212; 16 N. W. Rep. 94.

<sup>2</sup> *Atkinson v. Hawkeye Ins. Co.* (Iowa), 32 N. W. Rep. 371.

<sup>3</sup> *Somerset Co. F. Ins. Co. v. May*, 2 W. N. C. (Pa.) 43.

<sup>4</sup> *Van Slyke v. Trempealeau, etc., Ins. Co.*, 48 Wis. 683.

ditionally accepted, ripens the negotiation into a contract. In the case of fire insurance contracts there is often a contract before the policy is issued or before it is delivered to the insured, but this is seldom so with life insurance agreements, because there is usually, in the applications as well as the policies, a stipulation that the policy shall not be binding until delivery to the assured while in good health and payment of the premium by him. Under some circumstances there may be a waiver of this last condition by a delivery of the policy, but this question is more properly one of waiver. With benefit societies all these questions may arise, although their habits and course of business are more simple, for necessarily there is the same kind of an application or proposal which is to be accepted, either conditionally or unconditionally, by the directors of the society.<sup>1</sup> Unless provided otherwise in the contract, the acceptance of the proposal to insure for the premium offered, is the completion of the negotiation, and after the policy or certificate has been forwarded to the agent of the company for delivery, the contract cannot be rescinded without the consent of the party insured.<sup>2</sup> It is, of course, different if any act remains to be done by the insured, or if it be stipulated that it shall not be binding until delivered by the agent. Thus, where the defendant made an application for insurance to the agent of the company in New Jersey and paid the premium, the policy to be issued and delivered to him if his application was accepted. The application was sent to the company in Pennsylvania and there approved and the policy issued and mailed to the applicant. It was held by the Supreme Court of New Jersey<sup>3</sup> that the contract was made in Pennsylvania and was complete as soon as the application was accepted and the policy

<sup>1</sup> See *post*, § 273.

<sup>2</sup> *Hallock v. Insurance Co.*, 26 N. J. L. 278; *Ala. Gold L. Ins. Co. v. Herron*, 56 Miss. 643; *Shattuck v. Mut. L. Ins. Co.*, 4 Cliff. 598.

<sup>3</sup> *Northampton, etc., Ins. Co. v. Tuttle*, 40 N. J. L. 103; 39 N. J. L. 486.

deposited in the mail. Other authorities support this view.<sup>1</sup> And where it was agreed between the agent and the assured that the first premium should be paid by note, and accordingly the application was forwarded, accepted by the company and returned to the agent, who refused to deliver it as the assured was sick, it was held<sup>2</sup> that the policy became binding upon the company when it was placed in the mail at the office of the company, if not, then certainly when it reached the hands of the local agent. So, when an application for insurance received by the agent was sent by him to the home office of the company, and the company accepted it and sent the policy to the agent, it was held by the Supreme Court of Minnesota<sup>3</sup> that it was the duty of the agent to deliver the policy upon tender of the premium, even though the person whose life was insured had become dangerously ill, unless it was otherwise agreed between the parties, or he was otherwise instructed by the company.<sup>4</sup> But delivery of the policy under circumstances which amount to fraud on the part of the assured will not change the relations of the parties. Thus, where negotiations were still pending between an agent of the company and the applicant concerning the precise terms of the contract and the mode of payment, a friend of the applicant paid the premium, concealing the fact that the assured was sick, and the latter in fact died a few hours later, and the agent, in ignorance of the facts, delivered the policy, the Supreme Court of the United States held<sup>5</sup> that there was no contract. If the application provides that the policy shall not be in force until it is delivered to the applicant, the contract

<sup>1</sup> *Adams v. Lindsell*, 1 B. & Ald. 681; *Mactier v. Frith*, 6 Wend. 103; *Tayloe v. Merchants' F. Ins. Co.*, 9 How. 390; 2 Kent's Com. 477.

<sup>2</sup> *Yonge v. Equitable L. Ass. Soc.*, 30 Fed. Rep. 902.

<sup>3</sup> *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215.

<sup>4</sup> *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 449.

<sup>5</sup> *Piedmont, etc., Ins. Co. v. Ewing*, 92 U. S. 377. .

of insurance will not become binding upon the company until delivered.<sup>1</sup>

§ 273. **The Same Subject: Contract may be Complete without Delivery of the Policy.** — A contract of insurance, however, may be complete without delivery of the policy, as where it has been made and executed and notice given to the assured,<sup>2</sup> or if the applicant is notified that his application has been accepted;<sup>3</sup> and there need not be manual delivery of the policy.<sup>4</sup> But where, independent of the policy, there is nothing to show any acceptance of the application, or any agreement to insure, the presumption is that while there were negotiations there was no contract, and no purpose to contract otherwise than by a policy made and delivered upon simultaneous payment of premium. Where there has been no transfer of the legal manual possession of the policy to the insured, or to any person for him, so as to constitute a delivery in fact, the policy is *prima facie* incomplete as a contract, and it devolves upon the alleged insured to show that the real intention was to pass the legal title and possession of the policy without or before payment of premium, and without delivery in fact, and that, though retained by the company's agent, the policy was constructively delivered.<sup>5</sup> It is usually a question of fact, depending upon the special circumstances of the case, whether anything remained to be done to complete the agreement, or if there was, whether doing it was waived.<sup>6</sup> For example, in a case in Nevada,

<sup>1</sup> *Kohen v. Mut. Reserve Fund L. Assn.*, 28 Fed. Rep. 705; *Misselhorn v. Same*, 30 Fed. Rep. 545.

<sup>2</sup> *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>3</sup> *Ala. Gold Life Ins. Co. v. Herron*, 56 Miss. 643.

<sup>4</sup> *Insurance Co. v. Colt*, 20 Wall. 560.

<sup>5</sup> *Heiman v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 153.

<sup>6</sup> *Gay v. Farmers', etc., Ins. Co.*, 51 Mich. 245; *Kelly v. St. Louis M. L. Ins. Co.*, 3 Mo. App. 554; *Diboll v. Etna Life Ins. Co.*, 32 La. Ann.

the facts shown were that an application was made to the agents of defendant for a policy of insurance on the life of plaintiff's husband; at the time the application was made fifty dollars was paid, according to the regulations of the company, which was to be applied on the first year's premium, provided the defendant should conclude to make the insurance. The application thus made was forwarded to the proper office of the company and a policy made out and sent on to the agent for delivery; but the insured having died before it was delivered, the agent refused to deliver it, although demanded and the balance of the premium tendered. The court held that this proof justified a conclusion that a contract for a policy was completed. It said: <sup>1</sup> "The application for a policy by the assured, with the payment of a portion of the premium, and acceptance of the risk by the defendant, left nothing to be done but the delivery of the policy and the payment by the plaintiff of the balance of the premium, which, it appears, was not required by the rules of the company until the completion of the transaction. These facts show a valid contract for a policy between the parties. The moment the company concluded to make the insurance, the fifty dollars paid to its agent became its property, without any further action on its part. It was paid upon the condition that if the company concluded to make the insurance, it should be applied in payment of the premium; when, therefore, the risk was taken, it became the property of the defendant, and at the same time the assured became entitled to the policy. Thus, there was the acceptance of the application by the company, and the payment of a portion of the premium, as a consideration therefor, by the plaintiff, which is all that was necessary to make a valid contract between the

179; *Fried v. Royal Ins. Co.*, 50 N. Y. 243; 47 Barb. 127; *Cooper v. Ins. Co.*, 7 Nev. 116.

<sup>1</sup> *Cooper v. Pacific Mut. Life Ins. Co.*, 7 Nev. 122.

parties. Such contracts are as available to sustain an action for the amount of the insurance as if the policy had been issued.”<sup>1</sup> In a case in California,<sup>2</sup> it was held that mutual benefit societies which undertake to pay money upon the death of the members are in law insurance companies and subject to the same rules. That whenever two constructions equally fair can be given that which gives the greater indemnity shall prevail. That a contract of insurance is complete when the terms offered are accepted, and the contract need not be in writing unless required by statute. That the contract may be made through the mail and the terms offered are accepted upon posting a letter to that effect. In mutual benefit societies the benefit certificate is merely evidence of the contract. That the medical examiner cannot reject applications arbitrarily, if made in good faith, after compliance with the requirements of the order and where the medical examiner ought to have approved an application, but the applicant dies before he does so, the application will be deemed approved. But the Supreme Court of New York has held,<sup>3</sup> in an action brought against the society to recover a death benefit that as the statute creating the corporation itself designated no beneficiary, and as the defendant had, in accordance with the direction of the statute, provided in its by-laws that the person to whom the fund should be payable on the death of a member should be the person named in the certificate, such designation and issue of certificate were conditions precedent to the defendant’s liability. The conclusion is that, in determining whether or not the contract with a benefit society is complete without issue of a certificate, the laws of the association must be alone regarded. The question is one of construction and the courts will save

<sup>1</sup> *Kohne v. Insurance Co., etc.*, 6 Binn. 219; 1 Wash. C. C. 93.

<sup>2</sup> *Oliver v. Am. Legion of Honor*, Sup. Ct. San Francisco, Pac. Coast. L. J. Dec. 9, 1882; 17 Am. L. Rev. 301.

<sup>3</sup> *Bishop v. Empire Order Mut. Aid*, 43 Hun, 472.

the contract whenever possible, even though a certificate be not issued.

§ 274. **Fraudulent Delivery of Policy.** — As has been intimated, there may be a delivery of the policy to the assured under circumstances that amount to fraud by the latter. As where the assured was at the time of the payment of premium by a friend, dangerously sick.<sup>1</sup> The understanding is always, where a proposal is made, that the state of facts therein represented to exist does in fact exist at the time the proposition is accepted. So, if after the application has been made, a material change in the health of the applicant takes place, and which would probably cause the rejection of the risk by the insurer if known to it, it will avoid the contract.<sup>2</sup> The reason of this rule is so obvious that it need not be further considered. When, however, a lapsed policy is to be reinstated no statement of intermediate changes need be disclosed unless asked for;<sup>3</sup> and so with changes between the date of the policy and the payment of the premium, unless otherwise stipulated, for the acceptance of the application and issue of the policy are upon the sole condition of payment of premium.<sup>4</sup>

§ 275. **After Contract is Complete Change in Risk Immaterial.** — After the contract is complete, even though the policy has not been delivered or the premium paid, changes in the condition of the risk do not affect the agreement, as for example where an application was made for life insurance and the premium tendered, which the agent refused to receive, saying that it made no difference. The

<sup>1</sup> *Piedmont, etc., Ins. Co. v. Ewing*, 93 U. S. 377.

<sup>2</sup> *Whitley v. Piedmont, etc., Ins. Co.*, 71. N. C. 480; *Wemyss v. Med. Ins., etc., Soc.*, 11 Ct. of Sess, 2 Ser. 345; *Traill v. Baring*, 4 DeGex J. & S. 318; *Edwards v. Footner*, 1 Camp. 530.

<sup>3</sup> *Day v. Mut. Ben. L. Ins. Co.*, 1 McArthur, 41.

<sup>4</sup> *Fourdrinier v. Hartford F. Ins. Co.*, 15 U. C. (C. P.) 403; *Canning v. Farquhar*, 16 Q. B. Div. 727.



policy was issued and received by the agent, who notified the applicant at the place of his residence, that he was insured and that he would bring the policy down the following week and get his money. The agent accordingly did go to the applicant's residence, but finding that he was sick, refused to deliver the policy unless the attending physician would certify that the assured was in no immediate danger. This certificate was given and the money again tendered, but was refused and the assured died two days later. Upon an action being brought on the policy the Supreme Court of Georgia held that the contract was complete upon the delivery of the policy to the agent, who could not subsequently impose additional terms, and the change in the health of the applicant was immaterial.<sup>1</sup>

§ 276. **There may be a Conditional Delivery of Policy.**—A policy of insurance may be conditionally delivered, it being held that, as they are not under seal, the rule that a deed cannot be delivered conditionally to the grantee or his agent has no application.<sup>2</sup> As where policies were delivered to be returned by the insured if he did not realize a satisfactory amount upon the cancellation of certain other policies.<sup>3</sup> But where the policy is once delivered unconditionally, previous negotiations and stipulations are thereby merged and rendered of no effect.<sup>4</sup> The question is one of fact as to what was the intention of the parties and of this the jury is the judge. The Supreme Court of Massachusetts has exhaustively discussed this subject in a

<sup>1</sup> *Southern Life Ins. Co. v. Kempton*, 56 Ga. 339; *Ellis v. Albany, etc., Ins. Co.*, 50 N. Y. 402; *Schwartz v. Germania L. Ins. Co.*, 21 Minn. 215; *Franklin F. Ins. Co. v. Colt*, 20 Wall. 560; *City of Davenport v. Peoria, etc., Ins. Co.*, 17 Ia. 276.

<sup>2</sup> *Harnickell v. N. Y. Life Ins. Co.*, 40 Hun, 558; *Benton v. Martin*, 52 N. Y. 570.

<sup>3</sup> *Harnickell v. N. Y. Life Ins. Co.*, *supra*.

<sup>4</sup> *Hodge v. Security Ins. Co.*, 33 Hun, 583; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

case that was before it on four different appeals and when it was unable to find a delivery, although the assured had for a time had manual possession of the policy.<sup>1</sup> Of course, where the application stipulates that it shall be the basis of the contract, which shall be completed only by delivery of the policy, the latter must be actually and unconditionally delivered in order to make the insurer liable.<sup>2</sup> The subject of conditional delivery of the policy was discussed by the Supreme Court of Connecticut in *Rogers v. The Charter Oak Life Ins. Co.*<sup>3</sup> There the agent of the company meeting the applicant urged him to get his life insured and, after some objection from the latter, an application was made out and signed and the applicant examined by the physician. It was agreed that when the policy was made out by the company and received by the agent the latter should forward it to the assured's address in New York City, who, if it was found to be as agreed, was to send the premium or if not return the policy. When the agent received the policy he mailed it as agreed, but the letter was returned uncalled for. The agent then sent the policy to the place where he supposed the assured might be, but he had died two days before. The court held that there was only an inchoate, not a complete, contract and that no liability attached under it.

**§ 277. Unconditional Delivery of Policy by Agent in Violation of Instructions.**—Where there has been an unconditional delivery of the policy in violation of the instructions of the company, the latter will generally be bound. For example, in a case in the Supreme Court of

<sup>1</sup> *Hoyt v. Mut. Ben. L. Ins. Co.*, 98 Mass. 539; *Markey v. Same*, 103 Mass. 78; *Same v. Same*, 118 Mass. 178; *Same v. Same*, 126 Mass. 158.

<sup>2</sup> *McCully v. Phoenix M. L. Ins. Co.*, 18 W. Va. 782; *St. Louis Mut. Life Ins. Co. v. Kennedy, etc.*, 6 Bush, 450; *Collins v. Ins. Co.*, 7 Phila. 201; *Faunce v. State M. L. Ins. Co.*, 101 Mass. 279.

<sup>3</sup> 41 Conn. 97.

the United States the facts were these: A policy had been taken from agents who had only authority to take applications and submit them to the company, which issued the policies and sent them to the agents to deliver and collect the premium. The agents were instructed not to deliver the policies until the whole premium was paid, but were told if they did so the premium would stand charged to them until it was received by the company or the policies returned. It was the custom of the agents to deliver policies to persons whom they deemed responsible and call for the money when wanted. In this case the policy was sent to the assured by the agents, who wrote him that they would get the money of a third person. Upon the refusal of this third person to pay, the agents so informed the assured, who promised to soon send a draft. Payment being still neglected, and the agents having learned that the person assured was "quite sick," they informed him by letter that his policy was forfeited and returned the premium notes he had given. This letter did not reach the address of the assured until after his death. The court held the company liable, saying:<sup>1</sup> "Where the policy is delivered without requiring payment, the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended, that the policy is valid, though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent and the amount is charged to him by the company, the transaction is equivalent to payment."<sup>2</sup> In a somewhat similar case in Tennessee the facts were that the assured applied for a policy to one Smithurst, the agent of the company for Louisiana, who sent the application to the home office of the company in Memphis, where it was ac-

<sup>1</sup> *Miller v. Life Ins. Co.*, 12 Wall. 285.

<sup>2</sup> The court cite *Goit v. Ins. Co.*, 25 Barb. 189; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460; *Wood v. Ins. Co.*, 32 N. Y. 619; *Bragdon v. Ins. Co.*, 42 Me. 259; *Trustees v. Ins. Co.*, 18 Barb. 69; 19 N. Y. 305.

cepted and the policy issued. Part of the premium was to be paid by note, the remainder in cash, the agent being instructed to deliver the policy only upon the actual payment of the cash part of the premium. On its face the policy acknowledged receipt of the premium, but the application, shown to be a part of the contract, stipulated that the policy should not be binding upon the company "until the amount of the premium as stated therein shall have been received by said company, or some authorized agent thereof, during the lifetime of the person assured." Smithurst delivered the policy without the cash payment, accepting the note of the assured for the amount. Soon after Smithurst was succeeded by Hatch & Smith as agents, and they found that the policy had been delivered without payment of the cash part of the premium. A draft was drawn for the amount, accepted by the assured, but was not paid and was afterwards surrendered and a note taken which was not paid, although payment was frequently demanded. Soon afterwards the assured died. The court held<sup>1</sup> that the company was liable and that Smithurst was a general agent of the company and, "being a general agent, without special instructions limiting his power, he has the power to determine for himself what he is willing to accept as a payment of the cash premium — when the cash is actually paid to him, the company can only look to him for it — if he chooses to receive something else than cash, it is probable that as between him and his principal, the latter would have the right to treat it as a cash payment to him and hold him responsible accordingly — so that the company would have, if they choose to exercise it, the same right they had before, and the agent only would be the loser." In the case of mutual companies the rule might not apply if there was any by-law of the company to a different effect, for the applicant is supposed to acquaint him-

<sup>1</sup> Southern Life Ins. Co. v. Booker, 9 Heisk. 606; 24 Am. Rep. 344.

self with the laws of the concern. But the question is one of construction and of the intent of the parties.<sup>1</sup>

§ 278. **Court of Equity can Correct Mistakes in Insurance Policies.** — “It is well settled,” says Chancellor Walworth<sup>2</sup> “that a court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments.<sup>3</sup> But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance, the label or written memorandum from which the policy was filled up, is always considered of great importance in determining the nature of the risk and the intention of the parties.” This is the case where the applicant trusts the agent to fill out the policy according to his wishes, although there is a mistake of law. Thus, where the plaintiff had been induced to act upon the superior knowledge of the defendant’s agent; the fact being that an agreement had been made between the insured and the agent that certain insurance should be granted by the latter on the property of a firm of which the insured was a member. The agent, without fraud, induced the insured to have the policy made in his own name, assuring him that in that form it would protect the firm. The Supreme Court of the United States held<sup>4</sup> that the policy must be reformed to meet the intention of the parties, on the ground that the insured had trusted the agent concerning the proper mode of executing the policy. The case therefore was one of trust. So, where a mortgagee applied for insurance through an agent, intending to pro-

<sup>1</sup> *Mulrey v. Shawmut Mut., & etc., Ins. Co.*, 4 Allen, 116; *Badger v. American Popular L. Ins. Co.*, 103 Mass. 244; *Ætna F. Ins. Co. v. Webster*, 6 Wall. 129

<sup>2</sup> *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige Ch. 278.

<sup>3</sup> *Phil. on Ins.* 14.

<sup>4</sup> *Snell v. Insurance Co.*, 98 U. S. 85.

cure an insurance of his mortgage interest, and so stating to the agent, but the agent drew the application as for an insurance on the property itself, in the name of the mortgagor and as his property, the amount to be payable in case of loss to the mortgagee, and so made the application and had the policy so made in the belief that such was the proper legal mode of effecting an insurance on the mortgage interest, it was held by the Supreme Court of Connecticut<sup>1</sup> that the mistake could be corrected by a court of chancery, although it was one of law and not of fact. This principle has been generally adhered to,<sup>2</sup> and, in general, equity will reform a policy which does not insure the interest upon which insurance was desired because of an error of law on the part of insurer's agent,<sup>3</sup> and this even after a loss.<sup>4</sup> In a recent case the Maryland Court of Appeals said:<sup>5</sup> "The law is well settled that where the general agent of a company is entrusted with the power to make and issue policies, and the insured fully and frankly discloses all facts material to the risk, and the agent in making out the policy, through fraud or mistake, fails to state such facts, such error or fraud on the part of the agent cannot be relied on by the company in avoidance of the policy, and a court of equity, upon application, will reform the policy so as to make it express the real contract between the parties."<sup>6</sup> The court

<sup>1</sup> Woodbury Savings Bank, etc., *v.* The Charter Oak, etc., Ins. Co., 31 Conn. 517.

<sup>2</sup> Longhurst *v.* Star Ins. Co., 19 Iowa, 364; Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212; Farmville Ins. Co. *v.* Butler, 55 Md. 233.

<sup>3</sup> Bailey *v.* American Cent. F. Ins. Co., 4 McCrary, 221; 13 Fed. Rep. 250; Sias *v.* Roger Williams Ins. Co., 8 Fed. Rep. 183; Keith *v.* Globe Ins. Co., 52 Ill. 518; Oliver *v.* Ins. Co., 2 Curt. C. C. 277.

<sup>4</sup> Woodbury Saving Bank *v.* Charter Oak, etc., Ins. Co., 31 Conn. 517; Fink *v.* Queen Ins. Co., 24 Fed. Rep. 318; Hill *v.* Millville Mut., etc., Ins. Co., 39 N. J. Eq. 66.

<sup>5</sup> Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212.

<sup>6</sup> The court cites Insurance Co. *v.* Wilkinson, 13 Wall. 222; Ins. Co. *v.* Mahone, 21 Wall. 152; Saving Bank *v.* Charter Oak Ins. Co., 31 Conn. 517; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Columbia Ins. Co. *v.*

of Errors and Appeals of New Jersey goes farther and says: <sup>1</sup> “If the proposal for insurance be prepared by the agent of the company, and he misdescribe the premises, with full knowledge of their actual condition, and there be no fraud or collusion between the agent and the insured, the contract of insurance may be reformed in equity and made to conform to the condition of the premises as they were known to the agent.” <sup>2</sup> So, in a case where, after the issuing of the policy to the plaintiff, he called the attention of the local agent to the erroneous description of the building insured, but was told that it made no difference, and afterwards the general agent and secretary of the defendant inspected the property, with a full knowledge of the description of the building, and pronounced the risk a good one, it was held <sup>3</sup> that the policy would be reformed. The court said: “The plaintiff was not careless; was not thoughtlessly satisfied with the terms of the policy, but sought an emendation thereof, and was baulked of a successful pursuit thereof by the action and declaration of the defendants through their agents and officers.” The court continues: “It is enough to authorize the reformation of the contract, if it appear that, through the mistake of both parties to it, the intentions of neither have been expressed in it. Now, if a court of equity had a right to find from the evidence that both the insurer and the insured meant to insure the very building that was burned; and meant to put in the policy no expression as to the character or situation of it different from the facts; but, by a misconception as to the meaning and effect of language, have used terms which do express that which

Cooper, 50 Pa. 331; *Masters v. Madison Ins. Co.*, 11 Barb. 624; *Peck v. New London Ins. Co.*, 22 Conn. 575.

<sup>1</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. C. 574.

<sup>2</sup> The court cites *Collett v. Morrison*, 9 Hare, 162; *In re Universal*, etc., *F. Ins. Co.*, L. R. 19 Eq. 485; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Woodbury Savings Bank v. Charter Oak Ins. Co.* 31 Conn. 517; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

<sup>3</sup> *Maher v. Hibernia Ins. Co.*, 67 N. Y. 290.

they did not intend to express, and which did fail to express that which they did intend to express; such evidence does make a case for a reformation of the policy so as to conform it to the intentions and purposes of the parties.”<sup>1</sup> Where there is a mistake or failure to express the intention of the parties, the jurisdiction of equity to reform is unquestioned and has been often exercised. This has been done where the language of the party who drew the contract failed to adequately or perfectly express the common intention of the parties. As where, in an action to reform a policy of insurance upon the plaintiff’s life, which was expressed to be “for the sole and separate use and benefit of his wife, Lina Goldsmith, but in case of her previous death to revert to the insured,” it appeared that the policy was drawn by the insurance agent upon general directions by the plaintiff as to its terms, and the plaintiff’s intention then was, that the beneficiary named should have the insurance, if she was his wife at the time of his death, and that she had since been divorced for adultery. The court held<sup>2</sup> that the policy should be reformed so as to run for her benefit so long as she remained a wife.

**§ 279. When Equity will Relieve if Agent has Acted in Bad Faith.** — Where there is bad faith on the part of the agent, or where a policy is written materially differing from the prior agreement of the parties, equity will always interfere. Though the principle has been generally applied to fire insurance contracts, there seems to be no good reason why it should not be applied to cases of life insurance where the facts are analogous. For example, in a case in New York, the plaintiff having an insurance with the defendant of his interest as mortgagee, took another mort-

<sup>1</sup> *Many v. Beekman Iron Co.*, 9 Paige, 188; *Pitcher v. Hennessey*, 48 N. Y. 415; *McCall v. Ins. Co.*, 66 N. Y. 505.

<sup>2</sup> *Goldsmith v. Union Mut. L. Ins. Co.*, 18 Abb. N. C. 325.



gage on the same premises and applied to defendant for a renewal of the first policy, with an increase of the insurance to the amount of both mortgages; this was agreed to, and a new policy was issued, which contained a clause, not in the first policy, to the effect that, in case of loss, the assured should assign to the defendant all her right to receive satisfaction from any other person, and that the loss should not be payable until after the enforcement of the original security and defendant should only be liable for so much as could not be collected. This policy was renewed from time to time, and plaintiff did not discover the change until after a loss. Both mortgages contained the usual insurance clause, and it was agreed thereby that the mortgagors should pay the premiums and have the benefit of the policy in the payment of the debt. In an action to reform the policy and recover thereon as reformed the court held:<sup>1</sup> that the plaintiff was entitled to relief and that it was bad faith on the part of the defendant to so change the terms without notice and to deliver the new as simply a renewal of the old policy. And further, that the negligence of plaintiff in not discovering the change and *laches* in not sooner seeking relief were only matters making the propriety of granting the relief discretionary. In this case the court said: "It was bad faith on the part of the defendant to change so radically the terms of the policy and deliver it as a policy simply renewing the old one, without notice of the change. A party whose duty it is to prepare a written contract, in pursuance of a previous agreement, to prepare one materially changing the terms of such previous agreement, and deliver it as in accordance therewith, commits a fraud which entitles the other party to relief, according to the circumstances presented. Equity will reform a written instrument in cases of mutual mistake, and also in cases of fraud, and also where there is a mistake on

<sup>1</sup> Hay v. Star F. Ins. Co., 77 N. Y. 235.

one side and fraud on the other.<sup>1</sup> The negligence of the plaintiff in not discovering the change and *laches* in not sooner seeking relief, are questions which make the propriety of granting relief, in a given case, discretionary. The court below, upon the findings of fact, properly exercised its discretion in this case in granting relief. Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments." To the same effect is the recent case of *Palmer v. Hartford F. Ins. Co.*,<sup>2</sup> where the plaintiffs held a policy of insurance of the defendants and, on the policy expiring, applied to the defendants for a renewal policy, to be on the same terms with the expiring one, which the defendants promised to give. The defendants wrote and delivered the new policy and received the premium. The plaintiffs, supposing it to be on the same terms with the first, did not examine it until after the loss of the property by fire three months later, when, on reading it, they discovered an important variance from the former policy, materially affecting their right of recovery. If they had known of the change they would not have accepted the policy. In a suit for the reformation of the policy, and a recovery of what would become due under it, it was held that the plaintiffs could not be regarded as guilty of *laches* in not examining the policy and applying earlier for its correction, since they had a right to believe it to be in all essential respects like the former one. After a review of a number of authorities<sup>3</sup> the court says: "It is a matter of

<sup>1</sup> *Welles v. Yates*, 44 N. Y. 525; *Rider v. Powell*, 28 N. Y. 310 and cases cited.

<sup>2</sup> 54 Conn. 488; 4 N. Eng. Rep. 470; 9 Atl. Rep. 248.

<sup>3</sup> *Andrews v. Essex Ins. Co.*, 3 Mason, 10; 1 Story Eq. Jur., § 159; *Oliver v. Mut. Com. Ins. Co.*, 2 Curtis, 277; *N. Amer. Ins. Co. v. Whipple*, 2 Biss. 419; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278; *Wood on F. Ins.*, § 484; *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Nat.*

common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things, namely, the subject, its location, the owner, the amount, the time and the price, embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applies to the underwriter and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and when he receives the policy he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes justification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit. But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite by making a written draft of all the terms, conditions and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate

copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not, for his pecuniary advantage, to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character. The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read." The latter part of the foregoing remarks apply to applications as well as policies and is a statement of the same principle which has led the courts, in many cases, of which *Insurance Co. v. Wilkenson*<sup>1</sup> is one, to hold that when the agents of life insurance companies, in soliciting insurance, undertake to prepare the application of the insured, or make any representations to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance companies, and not of the insured, any stipulation in the policies to the contrary notwithstanding.

§ 280. **Or if the Policy does not Conform to the Application.** — Where the policy does not conform to the application it will be reformed and the taking away of the policy without having compared it with the application does not preclude the assured from afterwards objecting to the mistake.<sup>2</sup> On the appeal to the court *in banc* of the Nova Scotia case cited, which was one where the policy did not conform to the application, it was affirmed, the court saying: "Admit the validity of the application, slip or label, as variously called, — and it is not sought to be contro-

<sup>1</sup> 13 Wall. 222.

<sup>2</sup> *Wylde v. Union Marine Ins. Co.*, 1 Nova Scotia Eq. 208; *Mottcaux v. Gov. & Co. of London Ass.*, 1 Atk. (545) 631.

verted; — admit the policy produced as that executed by defendants and delivered to plaintiffs under the application, — and neither party denies it, — and then a simpler, plainer case for the exercise of the powers of an equity court, it would be difficult to conceive.” The judge adds: “Policies of insurance are a class of contracts that require on the part of the assured the utmost good faith, but it should be reciprocal.”<sup>1</sup> The same rule has been applied by the Supreme Court of the United States.<sup>2</sup>

§ 281. **Or if the Errors are Manifest.** — Especially will will equity interpose to correct manifest errors, such as mistakes in dates or time of beginning or expiration of the risk,<sup>3</sup> or as to name of insured,<sup>4</sup> or as to the interest to be protected,<sup>5</sup> or in description of premises.<sup>6</sup>

§ 282. **Reasons for Refusal to Interfere.** — It is no reason for not reforming a policy that the complainant might enforce payment of the loss in an action at law.<sup>7</sup> But delay in asking for the relief may be considered to prevent the court acting,<sup>8</sup> and if an action at law has failed, the unsuccessful party cannot then apply to have the contract reformed;<sup>9</sup> nor if the error is so apparent that there is no necessity for reformation;<sup>10</sup> nor if the mistake resulted from

<sup>1</sup> *Wylde v. Union Marine Ins. Co.*, 1 Russ. & Ch. (Nova Sc.) 205.

<sup>2</sup> *Equitable Ins. Co. v. Hearne*, 20 Wall. 494 (4 Cliff. 192).

<sup>3</sup> *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; *Knox v. Lycoming F. Ins. Co.*, 50 Wis. 671; *N. Am. Ins. Co. v. Whipple*, 2 Biss. 419.

<sup>4</sup> *Spare v. Home Mut. Ins. Co.*, 9 Sawy. 142; 17 Fed. Rep. 568.

<sup>5</sup> *Williams v. North German Ins. Co.*, 24 Fed. Rep. 625; *Fink v. Queen Ins. Co.*, 24 Fed. Rep. 318; *Banks v. Wilson*, Nova Sc. Eq. 210.

<sup>6</sup> *Home Ins., etc., Co. v. Lewis*, 48 Tex. 622; *Same v. Myer*, 93 Ill. 271.

<sup>7</sup> *Delaware, etc., Ins. Co. v. Gillett*, 54 Md. 219.

<sup>8</sup> *Bishop v. Clay, etc., Ins. Co.*, 49 Conn. 167; *Zallee v. Conn. Mut. L. Ins. Co.*, 12 Mo. App. 111.

<sup>9</sup> *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498; 12 Hun, 641; *Washburn v. Great Western Ins. Co.*, 114 Mass. 175.

<sup>10</sup> *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628.

the supine negligence of the party, who slept upon his rights, until other duties and responsibilities grew up; <sup>1</sup> nor if a new contract would be the result, imposing new liabilities on the defendant; <sup>2</sup> nor unless there was a mutual mistake; <sup>3</sup> nor if it appears that no action is maintainable on the policy because of lapse of time; <sup>4</sup> nor if the insurer was induced to issue the policy by the false representations of those who claim a benefit under it. <sup>5</sup> There must be either mutual mistake or fraud. <sup>6</sup> A policy of insurance cannot be reformed by parol evidence of mistake on the part of the insured alone, nor to the extent of altering a warranty. <sup>7</sup> Courts will not lightly interfere and reform a contract. As was said by the New York Court of Appeals: <sup>8</sup> "The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed (except in the case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of these cardinal principles, in the administration of this peculiar remedy, would lead to the assumption of a power which no court possesses, of making an agreement between parties to which they have not both assented." <sup>9</sup> The presumption is that the contract expresses the will of the parties. <sup>10</sup>

<sup>1</sup> *Susquehanna, etc., Ins. Co. v. Swank*, 102 Pa. St. 17.

<sup>2</sup> *Sykora v. Forest City, etc., Ins. Co.*, 2 Cin. L. B. 223.

<sup>3</sup> *Durham v. Fire & Marine Ins. Co.*, 10 Sawy. 526; 22 Fed. Rep. 468.

<sup>4</sup> *Thompson v. Phoenix Ins. Co.*, 25 Fed. Rep. 296.

<sup>5</sup> *Spare v. Home Mut. Ins. Co.*, 9 Sawy. 142; 17 Fed. Rep. 568.

<sup>6</sup> *Doniol v. Commercial F. Ins. Co.*, 34 N. J. Eq. 30.

<sup>7</sup> *Cooper v. Farmers' M. F. Ins. Co.*, 50 Pa. St. 299; 88 Am. Dec. 544.

<sup>8</sup> *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 455.

<sup>9</sup> *Miaghan v. Hartford Fire Ins. Co.*, 12 Hun, 321; *Bartholomew v. Mercantile, etc., Ins. Co.*, 34 Hun, 263.

<sup>10</sup> *Harrison v. Hartford F. Ins. Co.*, 30 Fed. Rep. 862.

§ 283. **No Relief when Legal Effect of Plain Terms was Misunderstood.**—There cannot be any relief if the party who procured the policy misunderstood the legal effect of plain and unambiguous words, no blame attaching to the other parties thereto. As where a man took out a policy on his wife's life, payable in four years to her, if living; and if not living to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce. The husband and wife interpleaded for the money. In deciding that the wife was entitled to the fund the court said: <sup>1</sup> "Does the answer of said Volney show a case of fraud or mistake? There is clearly no fraud alleged. We do not think the answer shows a case for relief on the ground of mistake. It does not allege that the policy differs in its terms from what the parties intended. It simply alleges that said Volney supposed it was payable to him, according to its terms, and not to his wife, unless he died before it became payable. We do not see how he could have possibly supposed so, for he does not allege any ignorance of the terms; but if he did suppose so, he supposed so because he misunderstood the legal effect of plain and unambiguous words. There is ordinarily no remedy for such a mistake, if the other parties be not to blame, and here no circumstances are alleged to take the case out of the ordinary rule." <sup>2</sup>

§ 284. **Application of Foregoing Principles to Benefit Societies.**—To what extent equity will aid the defective designation of beneficiary, or reform the certificate when

<sup>1</sup> *Etna Life Ins. Co. v. Mason*, 14 R. I. 583.

<sup>2</sup> *Blackburn's Case*, 8 De G., M. & G. 177; *Rashdall v. Ford*, L. R. 2 Eq. Cas. 750; *Farley v. Bryant*, 32 Me. 483; *Dill v. Shahan*, 25 Ala. 694; *Lanning v. Carpenter*, 48 N. Y. 408; *Nelson v. Davis*, 40 Ind. 366; *Gerald v. Elley*, 45 Ia. 322; *Story Eq. Jur.*, §§ 113, 116, 137; *Kerr on Fraud and M.* 409, 428.

issued, is uncertain. On general principles the same rules should apply to the contracts of benefit societies as to those of life insurance companies wherever the facts are similar. When equity is asked to aid the defective designation, or apparent failure to designate, it might be suggested that the case is one of non-execution of a power as distinguished from a trust, and again that there is no privity of contract between a benefit society and the beneficiary of its member, but neither of these objections would be insuperable. There is only one case where the subject was alluded to and there the case was one of evident mistake, for the secretary of the company was in fault. In this case<sup>1</sup> the Supreme Court of New Hampshire, said: "The defendant contracted to pay a sum not exceeding \$2,000 as a benefit, upon due notice of the death of Gigar, the assured, and the surrender of his certificate of membership to such person or persons as he may, by entry on the record book of the association or on the face of this certificate, direct the same to be paid.' The bill alleges, and the demurrer admits, that, at the time he made application for membership, he stated to the association (which means to its proper officer or officers), that it was his intention that the benefit should be paid to the plaintiff, to whom he was then, and at the time of his decease, betrothed. The prayer of the bill is for a reformation of the contract by inserting in the membership certificate the name of the plaintiff as beneficiary, and that the benefit may be paid her. Section 3 of article 4 of the by-laws makes it the duty of the secretary to keep a record of the members of the association and the persons to whom the relief is to be paid. If the fact is found at the trial term that the parties understood direction was given to enter the plaintiff's name upon the record-book as the beneficiary to whom the

<sup>1</sup> *Scott v. Provident Mut. Relief Association*, 63 N. H. 556; 2 N. Eng. Rep. 286; 4 Atl. Rep. 792.



benefit was payable, and that Gigar understood that her name would be so entered without further direction from him, it was the duty of the secretary to enter it; and the accident or mistake was one which equity will remedy. The accident could not be said to have arisen from the negligence or fault of Gigar, so as to preclude relief,<sup>1</sup> nor would it be the case of non-execution of a power as distinguished from a trust, where equity does not afford relief.<sup>2</sup> As equity interposes only as between the original parties and those claiming under them in privity<sup>3</sup> objection may be obviated by an amendment joining Gigar's administrator as co-plaintiff. She may then prosecute this suit in his name, giving him indemnity, if he requires it, against costs and expenses. The bill should also contain a prayer that the plaintiff's name may be inserted in the record-book as Gigar's beneficiary."

§ 285. **Jurisdiction of Equity to Decree Cancellation.**—In policies of fire insurance, a clause is usually inserted providing for the cancellation and surrender of the contract at the option of either party. Numerous cases have been decided in the courts of this country and of others involving questions relating to the manner of exercising this option and the time when it becomes effective. It is not necessary to refer to these adjudications. Similar stipulations in life policies are not so usual and instances of attempted rescission are comparatively rare. The jurisdiction of equity to decree a cancellation upon proper showing has never been doubted, for insurance contracts, like other writings, may be reformed so as to express the intention of the parties, or in cases of fraud, accident or mistake, be altogether avoided. A broad distinction is made between applications made in the lifetime of the insured, and those

<sup>1</sup> Story Eq. Jur., § 105.

<sup>2</sup> Story Eq. Jur., §§ 169, 170.

<sup>3</sup> 1 Story Eq. Jur., §§ 105, 165.

that come after the contingency insured against has happened, in the latter event, as we shall see later, it has generally been held that equity will not interfere, because the reasons and facts, relied on for cancellation, would be equally available in defense to an action at law upon the contract. As was said by Lord Bacon, "chancery is ordained to supply the law, not to subvert the law."<sup>1</sup> In *Fenn v. Craig*,<sup>2</sup> the general rule was laid down that a bill in equity would lie at the suit of a life insurance company to have a policy delivered up to be cancelled on the ground of fraud in effecting the insurance, where the instrument is not void upon the face of it. The court seemed to think, that the plaintiffs had a better equity if they brought their bill in the lifetime of the assured than if they waited until after his decease. The later case of *London Assurance v. Mansel*,<sup>3</sup> was one of concealment, and the Master of the Rolls did not seem to question the jurisdiction, but alone discussed the point whether there had in fact been a concealment, and whether it was material. The assured had equivocated about his application to other companies for insurance and rejection by them, and the court held that the policy should be decreed to be delivered up, saying that it was a very plain and clear case. In *Connecticut Mutual Life Insurance Company v. The Home Insurance Company*,<sup>4</sup> in the United States Circuit Court of Connecticut, the suit was to cancel a policy that the company had already attempted to cancel upon the ground that the insured had become so far intemperate as to impair his health, the policy stipulating that it should be void if this contingency happened. The owner of the contract refused to agree to the cancellation, but continued to tender the premiums. The bill was filed to definitely determine the rights of the par-

<sup>1</sup> 4 Bac. Works, 488, cited *Ins. Co. v. Stanchfield*, 1 Dill. C. C. 431.

<sup>2</sup> 3 Younge & Coll. 216.

<sup>3</sup> 11 Ch. Div. 363.

<sup>4</sup> 17 Blatchf. 142.

ties. A demurrer was interposed to the bill and overruled. Two reasons were alleged why the court should sustain the demurrer; the first was, that while a court of equity has power to cancel instruments which are void by reason of fraud in their inception, it has no jurisdiction to cancel instruments which have ceased to be binding since their execution; second, that while, at the instance of the assured a court of equity may compel an insurance company to reinstate a cancelled contract, equity will not interfere to enforce a forfeiture. In passing upon the demurrer Judge Shipman said: "Upon the first proposition, it is true, that a court of equity has not, or will not, exercise jurisdiction to cancel a contract, merely because it has become void or inoperative by reason of some fact which has taken place since its execution. Such an exercise of power would give a court of equity concurrent jurisdiction with courts of law over all contracts which one contracting party may allege to have been broken by the other.<sup>1</sup> But, while relief from the consequences of fraud is peculiarly the province of a court of equity, it has not refused to cancel contracts which have been performed, or which have become inoperative, when the special circumstances of the case rendered it unjust or oppressive that the contract should be an outstanding claim against the plaintiff. The reasonable rule is, that a court of equity will exercise its power of setting aside contracts for defects not apparent on their face, although such defects arose after the execution of the contracts, in cases where the special circumstances render it inequitable or unjust, or a hardship, to compel the plaintiff to await a suit at law at the instance of the other party.<sup>2</sup> Chancellor Kent was inclined to think in Hamil-

<sup>1</sup> *Thornton v. Knight*, 16 Sim. 508.

<sup>2</sup> *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Hoare v. Bremridge*, L. R. 8 Ch. App. 22; *Hartford v. Chipman*, 21 Conn. 488; *Ferguson v. Fisk*, 28 Conn. 501.

ton v. Cummings,<sup>1</sup> that a court of equity had jurisdiction to set aside a bond or other instrument, whether the instrument was void for matter appearing on its face, or from the proofs, 'and that these assumed distinctions were not well founded.' He says: 'Perhaps all the cases may be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult, or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation. If, however, the defect appears on the bond itself, the interference of this court will depend on a question of expediency, and not on a question of jurisdiction.' Second, it is true, that courts of equity will not aid to enforce a forfeiture, or to divest an estate for breach of covenant or condition subsequent, unless, perhaps, under extraordinary circumstances.<sup>2</sup> When an estate has been forfeited, or when a pecuniary penalty has been incurred, by reason of the happening of a condition subsequent, or of the breach of a covenant, there is usually an immediate remedy at law to regain possession of the estate or to recover the penalty. There being such a remedy equity will not interfere. 'The great principle is, that equity will not assist in the recovery of a penalty or forfeiture, when the plaintiff may proceed at law to recover it.'<sup>3</sup> In this case, there is no estate to be regained, there is no sum in damages to be recovered. The insured is still living, and a can-

<sup>1</sup> 1 Johns. Ch. 517.

<sup>2</sup> Horsburg v. Baker, 1 Pet. 232; Livingston v. Tompkins, 4 Johns. Ch. 415; 2 Story Eq. Jur., § 1319.

<sup>3</sup> Livingston v. Tompkins, 4 Johns. Ch. 432.

cellation of the contract is the only result which is to be attained. The plaintiff has now no remedy at law, and unless it can resort to a court of equity, it must wait and become a defendant at the future suit of the holder of the policy. When such a suit will be commenced is a matter of uncertainty. The rule is not applicable to the cancellation of a policy of insurance upon the life of a living person." The court then reasons that the relief should be given because of its expediency and in order to be just to the other policy holders. That the foundation of insurance is the law of averages and if the insured are permitted knowingly to indulge in practices that notoriously invite disease the investment of other insured persons is jeopardized. The court quotes the language of Justice Bradley<sup>1</sup> that "the insured parties are associates in a great scheme. The associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the co-existence of many risks arises the law of average, which underlies the whole business." The objection that the company has already exercised its option of declaring the forfeiture, is disposed of by the answer that it is important for the company to know before the death of the assured whether it has made an error in this action or not. That neither party should be left in doubt during a series of years as to his or its pecuniary rights in the policy. In a later case in the United States Circuit Court of North Carolina<sup>2</sup> it was sought to cancel a policy upon the same ground, the intemperance of the assured, the latter being still living. The court, citing *Insurance Co. v. Bailey*,<sup>3</sup> held that a court of equity would not set aside a policy of life insurance during the life of the assured on the ground that it had been rendered void by something not

<sup>1</sup> *N. Y. Life Ins. Co. v. Statham*, 3 Otto (93 U. S.), 24.

<sup>2</sup> *Connecticut Mut. Life Ins. Co. v. Bear*, 26 Fed. Rep. 582.

<sup>3</sup> 13 Wall. 616.

appearing on the face of the policy, and which could be proved by extrinsic evidence. That if such power existed it was not a case for the ordinary exercise of the discretionary power of a court of equity to order a cancellation, because the assured, who is now intemperate, may reform and live out the ordinary expectation of life. In *Home Insurance Co. v. Stanchfield*,<sup>1</sup> a case that was argued before Judges Miller and Dillon, in the United States Circuit Court in Minnesota, it was said, in the course of discussion, that before a loss occurred equity would cancel a policy obtained by false and fraudulent representations of the assured. This, however, would be simply an application of the general rule that whenever a contract is obtained by fraud or deception equity will decree its cancellation.

§ 286. **The Same Subject: Application to Benefit Societies.**—It might be an objection to this exercise of equity jurisdiction in the case of the contracts of benefit societies that the latter may expel the member for any fraud, or violation of the terms of the contract, that would justify the interference of a court of equity. The Kentucky Court of Appeals has held<sup>2</sup> that, where the by-laws of the company provide that if the assured misrepresent his habits as temperate, the board of directors, upon hearing, may drop his name from membership, the action of the board upon the charge is conclusive and *res adjudicata* and it cannot be afterwards raised in a suit on the policy after the death of the assured. In *Durantaye v. Societe St. Ignace*<sup>3</sup> the court, in a *mandamus* proceeding, held that a member of a benevolent insurance society was rightfully expelled for suppression of the fact that he was laboring under a pulmonary complaint and falsely representing at the time of his admission that he was in good health.

<sup>1</sup> 2 Abb. C. C. 1; 1 Dill. C. C. 424.

<sup>2</sup> *Jones v. National Mut. Ben. Assn*, 2 S. W. Rep. 447.

<sup>3</sup> 13 Low. Can. Jur. 1.

§ 287. **The Same Subject: Cancellation After Loss.** — After a loss has occurred a court of equity will not interfere to order a cancellation of the contract unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which may be irreparable and which equity alone is competent to avert. It is not sufficient that a defense exists, because it can be set up in an action at law on the policy,<sup>1</sup> nor that the evidence may be lost,<sup>2</sup> nor the inconvenience or risk of a reliance upon legal remedies.<sup>3</sup> In *Home Ins. Co. v. Stanchfield*,<sup>4</sup> which was heard before Judges Miller and Dillon in the United States Circuit Court, a bill was filed by an insurance company against the assured to enjoin an action at law on the policy, and to cancel the same because it had been procured by false and fraudulent representations, and the court held that it ought to be dismissed because founded solely upon matters which, if true, are a defense to the action at law, and no matters were shown making a resort to equity necessary or expedient. After a full review of the cases, Judge Dillon said: "The cases in the English books show that when bills are entertained, injunctions are refused or dissolved, thus leaving the real litigation to be had at law. If the verdict is for the policy, of course the bill is dismissed. If against it, then the bill may be brought to hearing, and the court will, in proper cases, order the policy to be surrendered, an order which, after such a verdict, is quite unnecessary and useless. The English cases referred to are not, as before observed, very satisfactorily reasoned, and are not free from conflict. The old cases are entitled to very little respect as authority, and the modern ones tend to show that equity will not oust the law jurisdiction, or interfere with the legal remedies where there is a

<sup>1</sup> *Globe Mut. L. Ins. Co. v. Reals*, 79 N. Y. 205.

<sup>2</sup> *Town of Venice v. Woodruff*, 62 N. Y. 462.

<sup>3</sup> *Fowler v. Palmer*, 62 N. Y. 533.

<sup>4</sup> 2 Abb. C. C. 1; 1 Dill. C. C. 424.

full defense at law, and no obstacle in the way of making it. Insurance contracts should stand upon the same footing as other contracts with respect to equity interference, else we have an anomaly in the law without any reason to justify it."

**§ 288. General Doctrine as to Interference of Equity Stated.**—The conclusion from the cases cited in the preceding sections is that in all cases arising upon insurance contracts, where the equitable jurisdiction is invoked to reform or cancel, or to give any other relief peculiar to courts of chancery, no distinction is to be made between such contracts and those relating to other matters; but, if relief is granted at all, it must be because of the application to the facts of the broad and fundamental principles of equity. In other words, it is only when the complainant has no remedy at law, and, because of fraud, accident or mistake, injustice would result if the relief asked were not granted, that a court of equity will exercise its powers and by so doing prevent wrong from being successful.



## CHAPTER IX.

### CHANGE OF BENEFICIARY: ASSIGNMENT.

- § 289. The Subject of this Chapter.**
- 290. Appointments Under Powers: when Revocable.**
- 291. Designation of Beneficiary is an Act Testamentary in its Character.**
- 292. Vested Rights of Payees in Life Insurance Companies.**
- 293. Opposing Authorities.**
- 294. Wife's Policy.**
- 295. When the Policy cannot be Assigned or the Beneficiary Changed.**
- 296. When the Policy has not Passed out of Control of Party Effecting it.**
- 297. Assignability of Life Insurance Policies.**
- 298. Assent of Insurer to Assignment.**
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- 300. Assignment after Loss.**
- 301. Assignment by Wife of Policy on Husband's Life when Wife dies before the Husband: Rights of Creditor of Wife.**
- 302. The Question of Insurable Interest as Affecting the Validity of Assignments of Life Policies.**
- 303. Validity of Assignment, how Determined; Amount of Recovery by Creditor and Assignee.**
- 304. Distinctions Between Certificates of Beneficiary Societies and Policies of Life Insurance in Respect to Assignment or Change of Beneficiary.**
- 305. Development of the Law Concerning Change of Beneficiary.**
- 306. Present Doctrine.**
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- 308. The Opposing View.**
- 309. When an Attempted Change of Beneficiary becomes Complete.**
- 310. Jurisdiction of Equity in Aid of Imperfect Change of Beneficiary.**
- 311. Change of Designation Governed by Same Rules in Respect to Beneficiary as Original Appointment.**
- 312. Rights of Creditors in Benefit.**

**§ 289. The Subject of this Chapter. — The distinctions between the beneficiary orders, or societies, and the regular**

life insurance companies no where appear more plainly than when we consider the rights of the beneficiary named in the certificate or policy. This is because of the fundamental differences in the contracts of these two classes of organizations which we are about to discuss in this place. In a policy of life insurance the undertaking is with the assured and the stipulated sum is payable to him upon the contingency named, — the ending of the life insured. Owing to the form of the contract the rights of the person to whom the insurance is to be paid become at once vested when the policy is delivered and cannot be altered or affected except by his consent.<sup>1</sup> The member of a beneficiary organization, on the other hand, as we have seen,<sup>2</sup> has no property interest in the benefit, but only the naked power of designating some one to receive it. This designated recipient also has no property, nor vested rights, in the benefit because his interest is contingent and uncertain, the power of the member to revoke the appointment and substitute a new beneficiary being specially reserved by the laws of the society, which laws enter into and form a part of the contract.<sup>3</sup> It is, however, of course possible for an insurance policy to contain a power of substitution, or revocation of appointment, and also for the contract of a benefit society to stipulate unconditionally that the beneficiary shall not be changed. But such stipulations are unusual. It is seen, therefore, that everything depends upon the terms of each contract. In this chapter we shall consider the right of the member of a benefit society to change the beneficiary named in his certificate; the interest which the beneficiary has in the benefit, or the assured has in a life insurance policy; and the assignability of certificates and policies.

<sup>1</sup> *Post*, § 292.

<sup>2</sup> *Ante*, §§ 236, 237.

<sup>3</sup> *Ante*, § 161.

§ 290. **Appointments under Powers, when Revocable.** — Ordinarily, appointments under powers are revocable. In Sugden on Powers<sup>1</sup> it is said: "A power to appoint includes in itself a power to revoke; and a power to do an act which can only be effected by an appointment, authorizes an appointment and, therefore, a revocation." In regard to real property Washburn says: "It should be understood, that, when the donee of a power intends to revoke the uses he appoints, he should expressly reserve this right in the deed executing the power. If such reservation be not made, the appointment cannot be revoked; and this is especially true where the power has been executed upon receiving a valuable consideration."<sup>2</sup> Wills are in their own nature always revocable and, therefore, where the power is executed by a will, an express power of revocation need not be inserted, but it may be revoked, and the original power re-executed *toties quoties*.<sup>3</sup> "The result of the authorities as to deeds (and the like observations apply to other instruments *inter vivos*) executing instruments appears to be: 1. That in a deed *executing* a power, a power of revocation and new appointment may be reserved, although not expressly authorized by the deed creating the power, and that such powers may be reserved *toties quoties*. 2. That where an appointment under a power is made by deed it cannot be revoked, unless an express power be reserved in the deed by which the power is executed; a revocation will not be authorized by a general prospective power in the deed creating the first power."<sup>4</sup>

§ 291. **Designation of Beneficiary is an Act Testamentary in its Character.** — The designation of a beneficiary by a member of a benefit society is an act testamentary

<sup>1</sup> Vol. 1, p. 238 (ed. 1856).

<sup>2</sup> 2 Washb. on Real Prop. 330.

<sup>3</sup> Sugden on Powers, Vol. 1, p. 462.

<sup>4</sup> Sugden on Powers, Vol. 1, p. 462.

in its character and the same rules of construction apply as in the case of other testamentary writings.<sup>1</sup> In considering the validity of changes of beneficiary the courts have evidently been influenced by this fact. If, however, the certificate refer to the laws of the society, and these authorize the substitution or change of beneficiaries, it seems plain that the case is one where under the compact the right of revocation of the appointment is secured, and this right is again reserved in the instrument executing the power, so that no question should arise touching its validity.<sup>2</sup>

§ 292. **Vested Rights of Payees in Life Insurance Policies.** — When a policy of insurance is taken out payable to some other person than the assured, the beneficiary ordinarily has a vested right in the policy and its proceeds, consequently the assured cannot in any way control or dispose of the policy. A leading writer on the subject says: <sup>3</sup> “We apprehend the general rule to be that a policy and the money to become due under it, belong the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. An irrevocable trust is created. \* \* \* The legal representatives of the insured have no claim upon the money, and cannot maintain an action therefor, if it is expressed to be for the benefit of some one else.” And this statement is cited and approved by the Supreme Court

<sup>1</sup> *Duvall v. Goodson*, 79 Ky. 228; *Washington, Ben. Endowment Assn. v. Wood*, 4 Mackey, 19; *Continental Life Ins. Co. v. Palmer*, 42 Conn. 64; 19 Am. Rep. 530; *Union Mut. Aid Assn. v. Montgomery* (Mich.), 38 N. W. Rep. 588; 14 West. Rep. 877; *Thomas v. Leake*, 67 Tex. 469; 3 S. W. Rep. 708; *National American Assn. v. Kirgin*, 28 Mo. App. 80.

<sup>2</sup> *Ante*, § 255.

<sup>3</sup> *Bliss on Life Ins.*, § 318

of Indiana.<sup>1</sup> In a case arising in Massachusetts, where, in pursuance of an understanding with the mother of the insured, he took out a policy payable to her, but, upon his subsequent marriage, surrendered it and received a new one payable to the wife, it was held that the mother's rights were not affected. In this case<sup>2</sup> the court said: "There appears to have been a full understanding between him (the assured) and his mother that the policy was to be taken out for her benefit, and afterwards that it had been so done. In point of fact, it was made payable to her, and this was done with the intention of giving to her the benefit of it. This constituted a valid settlement in her favor. Nothing remained to be done by him to complete it. He might, indeed, afterwards fail to pay the annual premiums. This, however, does not prevent it from being a good trust. An unrevoked trust is valid, even though there is an express power of revocation.<sup>3</sup> In this case the assured reserved to himself no power of revocation, or of changing the beneficiary. It is true that he entered into no obligation to continue to pay the premiums; but the omission to do this did not have the effect to give to him an implied power of revocation. His mother might herself continue the payment of the premiums. Moreover, by the terms of the policy, after payment of two full annual premiums, it would not lapse, and certain valuable rights would still exist under it. Under these circumstances the assured could not legally surrender the policy without his mother's consent, and her rights are not affected by such surrender. This seems to us to be the true rule, and it is supported by the weight of authority."<sup>4</sup>

<sup>1</sup> *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Holland v. Taylor*, 111 Ind. 121.

<sup>2</sup> *Pingrey v. National Life Ins. Co.*, 144 Mass. 381; 11 N. East. Rep. 512; 4 N. Eng. Rep. 229.

<sup>3</sup> *Stone v. Hackett*, 12 Gray, 227.

<sup>4</sup> *Chapin v. Fellowes*, 36 Conn. 132; 4 Am. Rep. 49; *Lemon v. Phoenix*

§ 293. **Opposing Authorities.** — There is a class of cases in which it has been held that after the death of a wife, to whom a policy of insurance upon the husband's life was made payable, he may surrender it and take a new one for the benefit of another person. The reasons for these decisions are various, such as the supposed intention,<sup>1</sup> want of insurable interest in the personal representatives of the deceased wife,<sup>2</sup> and other reasons more or less cogent.<sup>3</sup> But in all these the principle of vested rights under a contract seems to be lost sight of, or some clause in the contract exempted it from the general rule, and they are, therefore, against the current of authority, except those cases where, from a construction of the policy, some power was reserved to the insured to change the beneficiary.

§ 294. **Wife's Policy.** — In pursuance of this doctrine of the vested rights of the beneficiary of a life insurance policy, it has been held that, when the wife is the beneficiary and the husband survives her, the property descends to her representatives as other personalty. Thus, where the deceased insured his life in favor of his wife, who died intestate in his lifetime, leaving an only child and then the

Ins. Co., 38 Conn. 294; *Ferndon v. Canfield*, 104 N. Y. 143; 10 N. East. Rep. 146; 6 Cent. Rep. 203; *National Ins. Co. v. Haley*, 78 Me. 268; *Barry v. Brune*, 71 N. Y. 261; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Manhattan Ins. Co. v. Smith*, 44 Ohio St. 156; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; 38 Am. Rep. 289; *Weston v. Richardson*, 47 L. T. (N. S.) 514; *Kimball v. Gilman*, 60 N. H. 54; *City Savings Bank v. Whittle*, 63 N. H. 587; *Allis v. Ware*, 28 Minn. 166; *Olmstead v. Masonic Ben. Soc.* 37 Kan. 93; 14 Pac. Rep. 449; *Wilmaser v. Continental Life Ins. Co.*, 66 Ia. 417; *Gould v. Emerson*, 99 Mass. 154; *Waldrom v. Waldrom*, 76 Ala. 285; *Drake v. Stone*, 58 Ala. 133; *Pilcher v. N. Y. Life Ins. Co.*, 33 La. Ann. 322; *Packard v. Conn. Mut. Life Ins. Co.*, 9 Mo. App. 469; *Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; *Stillwell v. Mut. Life Ins. Co.*, 72 N. Y. 385.

<sup>1</sup> *Bickerton v. Jacques*, 28 Hun, 119.

<sup>2</sup> *Gambis v. Covenant Mut. L. Ins. Co.*, 50 Mo. 44.

<sup>3</sup> *Foster v. Gile*, 50 Wis. 603; *Clark v. Durand*, 12 Wis. 223; *Roberts v. Roberts*, 64 N. C. 695; *Kerman v. Howard*, 23 Wis. 108.

husband died intestate and insolvent, the child surviving, it was held that the proceeds of the policy were, under the intestate laws of Pennsylvania, to be distributed, share and share alike, between the child and the representatives of the husband.<sup>1</sup> In *Olmstead v. Keys et al.*<sup>2</sup> the policy was payable to the trustee of a wife and after her death her husband married again and had the policy changed so as to be payable to his second wife. The husband afterwards died, leaving several children by his first and one by his second wife. The Court of Appeals of New York held that the widow was entitled to the proceeds and applied the common-law right of the husband surviving his wife to her choses in action which he might reduce to possession.<sup>3</sup> In the case of benefit societies, where the right is reserved to the member to control and dispose of the benefit at all times, if the certificate is made payable to the wife and she die before her husband her interest will be held to have terminated at her death,<sup>4</sup> and under some conditions his representatives will have the preference over hers, as where such appears to have been the intent,<sup>5</sup> and where the certificate was payable to the wife "or her legal representatives" and she died before the husband it was held by a divided court<sup>6</sup> that the trust was intended for the wife alone and upon her death resulted to the husband, upon the principle that where the object of the trust fails there is a resulting trust to the grantor. The words legal representatives were held to have no signification different from

<sup>1</sup> *Anderson's Estate*, 85 Pa. St. 202; *United Breth. Mut. Aid Assn. v. Miller*, 107 Pa. St. 162.

<sup>2</sup> 85 N. Y. 593.

<sup>3</sup> See also *Continental L. Ins. Co. v. Hamilton*, 41 Ohio St. 274; *Lee v. Murrell*, 7 Ky. Law Rep. 598; *Cole v. Knickerbocker L. Ins. Co.*, 63 How. Pr. 442.

<sup>4</sup> *Richmond v. Johnson*, 28 Minn. 447; *Tafel v. Knights of the Golden Rule*, 12 Cin. L. Bul. 35.

<sup>5</sup> *Expressmen's, etc., Soc. v. Lewis*, 9 Mo. App. 412.

<sup>6</sup> *Washington, etc., Assn. v. Wood*, 4 Mack. 19.

that which is attributable to those words generally, viz.: persons appointed either by will or by the law to administer upon the estate of a deceased. Under special circumstances the proceeds of a policy upon the husband's life payable to the wife who dies before her husband will be divided between his estate and hers.<sup>1</sup> Generally, the question is one of construction of the policy and an application of the statutes governing descents, or governing the disposition of policies payable to the wife.<sup>2</sup> Under some circumstances evidence of intent will be admissible and control the disposition, as where a policy of insurance was in the name of a wife on the life of her husband and the amount was payable to the wife, her executors, administrators or assigns, if she survived her husband; otherwise to their children for their use or to their guardian if under age. The wife did not survive her husband, and the only child was one by adoption who was of age. It was held<sup>3</sup> that the children were the sole beneficiaries and the policy was payable to them and that as the only child was one by adoption and the circumstances showed that the parties intended that he should be included in the benefits of the policy, he was entitled to all the proceeds of such policy.

**§ 295. When the Policy cannot be Assigned or the Beneficiary Changed.**—If the policy provides expressly that no assignment thereof shall be made, the stipulation is binding upon the parties.<sup>4</sup> Where the laws of a benefit as-

<sup>1</sup> Estate of Balz, 12 Phila. 29; National Life Ins. Co. v. Haley, 78 Me. 268.

<sup>2</sup> Continental Life Ins. Co. v. Webb, 54 Ala. 688; Drake v. Stone, 58 Ala. 133; Fearn v. Ward, 65 Ala. 33; Fletcher v. Collier, 61 Ga. 653; Conn. M. Life Ins. Co. v. Fish, 59 N. H. 126; Norris v. Massachusetts M. L. Ins. Co., 131 Mass. 294; Troy v. Sargent, 132 Mass. 408; In re Adams Policy Trusts, 23 Ch. Div. 525; In re Mellor's Policy Trusts, 6 Ch. Div. 127.

<sup>3</sup> Martin v. Aetna L. Ins. Co., 73 Me. 25.

<sup>4</sup> Unity M. L. Ass. v. Dugan, 118 Mass. 219.



sociation provide that the benefit shall be paid to the person named in the application of the member, and no provision is made for a change of beneficiary, the rights of the latter are vested and cannot be affected by any act of the member.<sup>1</sup> In one of these cases<sup>2</sup> the Supreme Court of Indiana says: "We can see no way to avoid the conclusion that this charter provision requires the benefit to be paid to the person named in the application, or to those specified in the case of the death of those persons, or of some occurrence making it impossible to pay to them. Not only does the charter in direct terms declare that the benefit shall be paid to the persons thus named, but it also declares that if it becomes impossible to pay it to them, it shall go in the manner specified in the charter. The effect of these provisions is that the beneficiaries named must receive the money due on the policy, or it must be disposed of as provided by the charter creating the association. The provision respecting the mode of disposing of the benefit deprives the insured and the insurer of any right to change the contract, as it leaves only two possible classes of beneficiaries, those named in the application and those specified in the charter, as entitled to take in case the designation in the application is 'changed by death,' or 'otherwise becomes impossible.'"

**§ 296. When the Policy has not passed out of Control of Party effecting It.**—If the party who procures and pays for a policy of life insurance, which is by its terms payable to a third party, retains possession of the policy, he may generally surrender it, or revoke the designation of

<sup>1</sup> Kentucky Masonic M. L. Ins. Co. v. Miller, 13 Bush, 489; Gibson v. Ky. Grangers, etc., Soc., 8 Ky. L. Rep. 520; Ky. Grangers, etc., Soc. v. Howe, 9 Ky. Law Rep. 198; Olmstead v. Masonic Mut. B. Soc., 37 Kan. 93; 14 Pac. Rep. 449; Basye v. Adams, 81 Ky. 368; Presbyterian Ass. Fund v. Allen, 106 Ind. 593; Grand Lodge v. Elsner, 26 Mo. App. 108; Thomas v. Leake, 67 Tex. 469; 3 S. W. Rep. 703.

<sup>2</sup> Presbyterian Ass. Fund v. Allen, 106 Ind. 593; 4 West Rep. 712; 7 N. E. Rep. 317.

beneficiary and appoint a new person to receive the proceeds. In one case, one Peterson obtained a policy on his own life payable to himself, but afterwards surrendered it and had a new one issued payable to his betrothed, which he gave to her brother for her and so told her. Afterwards he obtained the policy, surrendered it and had a new one issued payable to a creditor, and then died. The Supreme Court of Connecticut, in holding the lady to whom the insured was betrothed entitled to the proceeds, said: <sup>1</sup> "It is not claimed that the mere fact of making the policy payable to Miss Lemon, without more, vested in her a complete title. It is conceded that so long as Mr. Peterson retained it in his own possession, he might control it as his own. On the other hand it is not doubted that if Mr. Peterson delivered it to Miss Lemon as a gift to her, such delivery would vest in her a complete title." This view has obtained in other cases.<sup>2</sup> In a New York case<sup>3</sup> the constitution of a benefit society provided for a fund to be paid upon the decease of a member to his widow or minor children; afterwards this law was changed so as to allow the member to designate his beneficiary. The member, under the new law, although he had belonged to the society from the first, and under the new constitution as well, designated a woman with whom he was living, describing her as his "wife." The claim was made by the society in defense to an action by the beneficiary, that the plaintiff was not the widow of the deceased and had not been designated as the beneficiary in accordance with the constitution of the society. In giving judgment for the plaintiff the court said: "The case seems to me to be sim-

<sup>1</sup> *Lemon v. Phoenix Mut. Life Ins. Co.*, 38 Conn. 301.

<sup>2</sup> *Penn. Mut. Ins. Co. v. Watson*, 3 W. N. C. 513; *Weston v. Richardson*, 47 L. T. 514; *Garner v. Germania Life Ins. Co.*, 13 Daly, 255; 17 Abb. N. C. 7; *Johnson v. Van Epps*, 14 Bradw. 201; 110 Ill. 551. But see *Glanz v. Gloeckler*, 10 Bradw. 484; 104 Ill. 573.

<sup>3</sup> *Durian v. Central Verein, etc.*, 7 Daly, 170.

ply this: the title of Catharine Durian (the true wife) is not protected by the statutes of the State. If she be entitled to the insurance money, it must be because of a contract made between Philip Durian and the defendant, which it was out of their power afterwards to vary, because she had an interest in it which it would be unjust and unlawful to impair. What interest had Catharine in it? Why could it not be modified by the parties who made it? The counsel of the defendant has not shown. Conceding that Philip intended, at first, that she should receive the insurance money, he had a right to change the direction in which the money should go at any time before he had actually placed in her hands, or beyond his own control, the means of enforcing her claim to the money.<sup>1</sup> It was competent, in my opinion, for Philip and the Verein to modify their agreement in any manner satisfactory to both parties. It was competent for Philip, with the consent of the Verein, to name a beneficiary other than his wife, even though his wife were present. The amended constitution, to which he assented, formed a new contract between him and the Verein, under the terms of which he was at liberty to choose whom he pleased as appointee. He named Barbara, the plaintiff." This was followed in a later case in the same State.<sup>2</sup> If the policy expressly covenants that upon the decease of the beneficiary the insured may substitute any other, this stipulation controls, but the option must be exercised within a reasonable time after the death of the first beneficiary. Such substitution cannot be made by will, nor after the payment of the next ensuing premium. The payment of each premium, so to speak, makes a new contract.<sup>3</sup>

<sup>1</sup> *Lemon v. Phoenix L. Ins. Co.*, *supra*.

<sup>2</sup> *Deady v. Bank Clerks', etc., Assn.*, 17 Jones & Sp. 246.

<sup>3</sup> *Eiseman v. Judah*, 1 Flip. 627. See same case and note in 4 Cent. L. Jour. 345; *Roberts v. Roberts*, 64 N. C. 695; *Robinson v. Duvall*, 79 Ky. 84.

§ 298 CHANGE OF BENEFICIARY: ASSIGNMENT.

§ 297. **Assignability of Life Insurance Policies.**—At common law policies of fire or life insurance were not assignable, but the assignee could sue in the name of his assignor.<sup>1</sup> The assignee, however, could sue in equity, but latterly it was considered that the right at law was adequate and complete.<sup>2</sup> Life insurance policies are said to be choses in action and may therefore be assigned by indorsement and delivery,<sup>3</sup> and a mere verbal assignment with delivery is sufficient,<sup>4</sup> and so very informal assignments have been held sufficient to vest in the assignee the equitable right to the proceeds.<sup>5</sup> It is not always necessary that delivery be made; any act carrying out the intention of the insured and communicated to the insurer is enough in equity.<sup>6</sup> But generally to make a valid assignment there must be a delivery of the policy.<sup>7</sup>

§ 298. **Assent of Insurer to Assignment.**—It has been said that the reasons requiring the assent of the underwriter to make assignments of fire insurance policies valid do not apply to cases of insurance upon human lives.<sup>8</sup> Where the assent of the insurer to an assignment was re-

<sup>1</sup> *Jessel v. Williamsburg Ins. Co.*, 3 Hill, 88; *Palmer v. Merrill*, 6 Cush. 282; 52 Am. Dec. 782; *Hobbs v. Memphis Ins. Co.*, 1 Sneed, 444; May on Ins. § 377.

<sup>2</sup> *Carter v. United States Ins. Co.*, 1 Johns. Ch. 463.

<sup>3</sup> *Bushnell v. Bushnell*, 92 Ind. 503; *Hutson v. Merrifield*, 51 Ind. 24; 19 Am. Rep. 722; *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285.

<sup>4</sup> *New York Life Ins. Co. v. Flack*, 3 Md. 341; 56 Am. Dec. 742; *Pierce v. Fire Ins. Co.*, 50 N. H. 297; *Powles v. Innes*, 11 Mee. & W. 10; *Chapman v. McIlwraith*, 77 Mo. 38; *Manning v. Bowman*, 3 Nova Scotia Dec. 42.

<sup>5</sup> *Scott v. Dickson*, 108 Pa. St. 6; *Greene v. Republic Fire Ins. Co.*, 84 N. Y. 572.

<sup>6</sup> *Marcus v. St. L. M. L. Ins. Co.*, 68 N. Y. 625; *Fortescue v. Barnett*, 3 Myl. & K. 36; *In re Trough*, 8 Phila. 214; *Chowne v. Bayliss*, 31 Beav. 351.

<sup>7</sup> *Ballou v. Gile*, 50 Wis. 614; *Dexter Savings Bank v. Copeland*, 77 Me. 263.

<sup>8</sup> *New York Life Ins. Co. v. Flack*, 3 Md. 341; 56 Am. Dec. 742.

quired by the policy, but there was no provision that an assignment without the consent of the company should avoid it, a parol transfer with delivery was held valid.<sup>1</sup> Where the assent of the company to an assignment is expressly required, such a stipulation is valid and will be enforced, and must be obeyed like any other condition. This assent may be given by the secretary, or any other person who is held out to the public as having the requisite authority, and may be in any form.<sup>2</sup> This assent is a matter between the company and the person asserting the claim under the policy, and consequently an assignment may be good between the parties, although the assent of the company is required by the terms of the contract and has not been obtained.<sup>3</sup> If the assignment is good under the law of the place where made it is good everywhere,<sup>4</sup> and the consent once given cannot be withdrawn<sup>5</sup> unless given under a mistake or because of misrepresentation.<sup>6</sup> A general assignment of all insurance policies, where the assignor has some which are assignable, and some not, will not carry those which are not assignable nor such as would be made void by assignment. The general words of an assignment are restrained by the particular words creating the subject of the assignment.<sup>7</sup>

§ 299. *Effect of Assignment.* — The effect of an assignment of a policy with the consent of the insurer is to place the assignee in the same condition and position with

<sup>1</sup> *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625.

<sup>2</sup> *May on Ins.*, § 333.

<sup>3</sup> *Marcus v. St. L. Mut. Life Ins. Co.*, 68 N. Y. 625; *Lee v. Murrell*, 9 Ky. L. Rep. (Ky. Superior Court) 104.

<sup>4</sup> *Lee v. Abdy*, 17 Q. B. Div. 309.

<sup>5</sup> *Grant v. Ins. Co.*, 75 Me. 203.

<sup>6</sup> *Eastman v. Carroil Co., etc.*, 45 Me. 307; *Merrill v. Farmers', etc., Ins. Co.*, 48 Me. 285.

<sup>7</sup> *Armstrong v. Mutual Life Ins. Co.*, 11 Fed. Rep. 573; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81.

respect to all rights and liabilities under it, that the insured occupied before the transfer. It amounts only to the substitution for the assured of the assignee as a party to the policy; it is the same as a re-issue of the policy to another party upon precisely the same terms and conditions as in the original.<sup>1</sup> The assignee can only take that which the assignment gives him,<sup>2</sup> nor can the transfer be attacked when the company does not object.<sup>3</sup> An assignment obtained by fraud will be set aside in proper equitable proceedings for that purpose<sup>4</sup> and it has been held that an assignor of insurance policies may maintain an action recover the policies or their value on the ground that he was incapacitated by drunkenness to make the assignments, without first having the assignments set aside by a suit in equity.<sup>5</sup> An assignment once made cannot be revoked if it is completed by delivery,<sup>6</sup> equity having no jurisdiction in such cases; but it will be set aside if made in fraud of creditors.<sup>7</sup> The rights of creditors, however, in life insurance policies carried or assigned by the debtor depend largely upon the statutes of the place where the assured resides.<sup>8</sup> The exemption of life insurance from the demands of creditors apply to policies issued by a foreign as well as a domestic insurance company.<sup>9</sup> Where a policy is wrongfully surrendered the rights of the beneficiary attach to the substituted policy.<sup>10</sup>

<sup>1</sup> *Ins. Co. v. Garland*, 108 Ill. 220, 9 Bradw. 571; *Harley v. Heist*, 86 Ind. 196.

<sup>2</sup> *Diffenbach v. Vogeler*, 61 Md. 376.

<sup>3</sup> *Diffenbach v. Vogeler*, *supra*.

<sup>4</sup> *Collins v. Hare*, 2 Bligh (N. S.), 106.

<sup>5</sup> *Bursinger v. Bank of Watertown*, 67 Wis. 75; 30 N. W. Rep. 290.

<sup>6</sup> *Crittenden v. Phoenix Mut. L. Ins. Co.*, 41 Mich. 442.

<sup>7</sup> *Ætna Nat. Bk. v. Manhattan L. Ins. Co.*, 24 Fed. Rep. 769.

<sup>8</sup> *Pullis v. Robison*, 73 Mo. 202; *Cole v. Marple*, 98 Ill. 58; *Thompson v. Cundiff*, 11 Bush, 567; *Baron v. Brummer*, 100 N. Y. 372; *Stigler v. Stigler*, 77 Va. 163; *Ex parte Dever*, 18 Q. B. Div. 660.

<sup>9</sup> *Cross v. Armstrong*, 44 Ohio St. 613.

<sup>10</sup> *Chapin v. Fellowes*, 36 Conn. 132; *Lemon v. Phoenix Mut. L. Ins.*

§ 300. **Assignment After Loss.**—A provision in an insurance policy avoiding it in case of its assignment without the consent of the company, applies only to an assignment made before a loss.<sup>1</sup> Assignment after loss passes the legal title and invests the assignee with the exclusive right to sue upon it. In his hands, however, it is subject to every defense which could have been set up against it in the hands of the previous owner before notice of the assignment was given to the company. The fact that the assignment was made as a collateral security for a debt will not vary the rule.<sup>2</sup> An assignment of an insurance policy made before loss, but not delivered until afterwards, does not take effect until delivery and then is the assignment of a money demand against the insurers.<sup>3</sup> A provision in a policy of fire insurance that the same shall not be assigned after the money thereon becomes due is void, being inconsistent with the covenant of indemnity and contrary to public policy.<sup>4</sup>

§ 301. **Assignment by Wife of Policy on Husband's Life.**—In cases where a policy of life insurance on the husband's life has been made payable to the wife, her power to assign has often come in question. The decisions of the courts upon this subject have not been uniform, for

Co., 38 Conn. 294; *Singer v. Charter Oak Ins. Co.*, 22 Fed. Rep. 774; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Stillwell v. Mut. L. Ins. Co.*, 72 N. Y. 385; *Whitehead v. N. Y. Life Ins. Co.*, 102 N. Y. 143, reversing 33 Hun, 425; *Timayenis v. Union Mut. L. Ins. Co.*, 22 Blatchf. 405; 21 Fed. Rep. 223.

<sup>1</sup> *Dodge v. Northwestern, etc., Ins. Co.*, 49 Wis. 501; *Roger Williams, etc., Ins. Co. v. Carrington*, 43 Mich. 252; *Combs v. Shrewsbury, etc., Ins. Co.*, 32 N. J. Eq. 515.

<sup>2</sup> *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287; *Perry v. Ins. Co.*, 25 Ala. 360; *Archer v. Ins. Co.*, 43 Mo. 434; *Wetmore v. San Francisco, etc.*, 44 Cal. 294; *Carter v. Ins. Co.*, 12 Ia. 292; *N. Y. L. Ins. Co. v. Flack*, 3 Md. 341.

<sup>3</sup> *Watertown Ins. Co. v. Grover, etc., Co.*, 41 Mich. 131.

<sup>4</sup> *Alkan v. N. H. Fire Ins. Co.*, 53 Wis. 136; *Spare v. Home Mut. Ins. Co.*, 9 Sawy. 142; 17 Fed. Rep. 568; *Goit v. Ins. Co.*, 25 Barb. 189; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289.

in many States statutes exist regulating to a greater or less extent the rights of the wife, and the conclusions of the judges have been influenced largely by the provisions of these statutes and the supposed policy of the law. One of the leading cases on the subject is *Eadie v. Slimmon*,<sup>1</sup> where the Court of Appeals of New York held that a policy of life insurance, payable to the wife for her benefit, and that of her children in case of her death, could not be transferred so as to divest the interest of the wife or her children. This was under the supposed effect of the statute of the State which distinguished between a policy of life insurance payable to the wife and an ordinary chose in action. The court said: "The provision is special and peculiar, and looks to a provision for a state of widowhood, and for orphan children; and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property or an ordinary security for money."<sup>2</sup> But this reasoning was held not to apply to an endowment policy under a later statute authorizing a transfer of a life insurance policy by a married woman with the consent of her husband.<sup>3</sup> The wrongful assignment of the policy is voidable at the wife's option.<sup>4</sup> The fact that the assignment was made without the State does not affect it if the contract of insurance was made in the State.<sup>5</sup> The Supreme Court of Connecticut<sup>6</sup> while inclined to adopt the view of the New York court, seemed to believe that if the wife paid the premiums on the policy out of her own estate

<sup>1</sup> 26 N. Y. 9.

<sup>2</sup> *Wilson v. Lawrence*, 76 N. Y. 585, 13 Hun, 238; *Barry v. Equitable Life Ass. Soc.*, 59 N. Y. 587.

<sup>3</sup> *Brummer v. Cohn*, 86 N. Y. 11; 9 Daly, 36; 58 How. Pr. 239; 6 Abb. N. C. 409, 57 How. Pr. 386; *DeJonge v. Goldsmith*, 14 Jones & Sp. 131.

<sup>4</sup> *Frank v. Mutual Life Ins. Co.*, 102 N. Y. 266, modifying 12 Daly, 267.

<sup>5</sup> *Mutual L. Ins. Co. v. Terry*, 62 How. Pr. 325. But see *Bloomington v. Lisberger*, 24 Hun, 355.

<sup>6</sup> *Connecticut Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305.



that would materially influence the case, for she ought under those circumstances to have the same right to dispose of a life insurance policy as any other chose in action. The assignment of a life policy on the husband's life by the wife as a security for his debt has been held void under a statute forbidding the wife to become surety for her husband,<sup>1</sup> and the wife's assignments have often been avoided when made under duress or undue influence,<sup>2</sup> or obtained by fraud,<sup>3</sup> or if made have been released under principles of law applicable to sureties, as by extension of time of payment of the debt without her knowledge.<sup>4</sup> Under a statute of Georgia it has been held by the Supreme Court of that State that the wife cannot assign to a creditor of the husband a policy on the latter's life, nor without other consideration ratify the assignment after his death.<sup>5</sup> It has been held that the statutes of New York in force at the time of the assignment<sup>6</sup> did not apply to policies made payable to the wife "or her assigns."<sup>7</sup> A policy of insurance upon the life of the husband for the benefit of the wife, may be pledged as collateral security by her for the debt of the husband or assigned by her absolutely, unless prohibited by local statute, the policy being a writing obligatory for the payment of money and assignable at law as well as equity. "This," says the Supreme Court of Colorado,<sup>8</sup> "is, we think, settled by the great weight of authority."<sup>9</sup> The policy may be assigned by the wife by

<sup>1</sup> *Stokell v. Kimball*, 59 N. H. 13.

<sup>2</sup> *Conn. Mut. Life Ins. Co. v. Westervelt*, 52 Conn. 586; *Whitridge v. Barry*, 42 Md. 140; *Barry v. Brune*, 71 N. Y. 261; 8 Hun, 395; *Barry v. Equitable Life Ass. Soc.*, 59 N. Y. 587.

<sup>3</sup> *McCutcheon's Appeal*, 99 Pa. St. 133.

<sup>4</sup> *Allis v. Ware*, 28 Minn. 166.

<sup>5</sup> *Smith v. Head*, 75 Ga. 755.

<sup>6</sup> 1868.

<sup>7</sup> *Robinson v. Mut. L. Ins. Co.*, 16 Blatchf. 194.

<sup>8</sup> *Collins et al. v. Dawley*, 4 Colo. 140.

<sup>9</sup> *De Ronge v. Elliott*, 23 N. J. Eq. 486; *Charter Oak Ins. Co. v. Brant*,

mere indorsement and delivery<sup>1</sup> and without the consent of the husband.<sup>2</sup> An assignment by the wife of a policy on her husband's life payable to her cannot be avoided by her creditors, either on the ground that it was not assignable, or because it was fraudulently assigned, the right to avoid can be only be exercised by the wife or her personal representatives.<sup>3</sup> Upon the theory that a vested estate, even though liable to be defeated by a condition subsequent, is transmissible and devisable, it has been held that, where a wife insured the life of her husband, the amount payable to herself if living, if not, to their children, and she died before her husband, and one of the children died before him, leaving a child, a transmissible interest vested in the children upon the issuing of the policy, and that the child of the deceased child took by descent the interest of its parent and was entitled to the portion of the fund which its parent would have received if living.<sup>4</sup> In a prior case on a similar policy in the same court,<sup>5</sup> where the life of the husband was insured for the benefit of the wife, and in case of her death, of the children, and the wife assigned the policy to a creditor and died during the lifetime of the husband, it was held that the interests of the children were unaffected by the assignment. But if there had been no children then the assignment would have been good and the right of the wife's representatives would not have been affected by her divorce nor by the fact that the husband

47 Mo. 419; *Chapin v. Fellowes*, 36 Conn. 132; *Merrill v. N. E. Mut. L. Ins. Co.*, 103 Mass. 245; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398; *Damron v. Penn. Mut. L. Ins. Co.*, 99 Ind. 478; *Pence v. Makepeace*, 65 Ind. 345; *Scobey v. Waters*, 10 Lea, 551.

<sup>1</sup> *Conn. Mut. L. Ins. Co. v. Westervelt*, 52 Conn. 586; *Norwood v. Guerdon*, 60 Ill. 253.

<sup>2</sup> *Whitridge v. Barry*, 42 Md. 140.

<sup>3</sup> *Smillie v. Quinn*, 90 N. Y. 492; 25 Hun, 332.

<sup>4</sup> *Continental L. Ins. Co. v. Palmer*, 42 Conn. 64.

<sup>5</sup> *Conn. Mut. L. Ins. Co. v. Burroughs*, 34 Conn. 305; 19 Am. Rep. 530.

paid the premiums.<sup>1</sup> The proceeds of a policy on the life of a husband in favor of his wife have been held to not be subject to the claims of her creditors;<sup>2</sup> upon the ground that the statute<sup>3</sup> was intended to secure something for the sustenance of the wife or children and the object of the statute would be thwarted if creditors could take it from them. It has been held differently in New York.<sup>4</sup>

§ 302. **The Question of Insurable Interest as Affecting the Validity of Assignments of Life Policies.**—In assignments of policies of life insurance the question of insurable interest again arises, and on this question there is more than the usual conflict of authorities; some holding that a policy is a mere chose in action, that may be passed from hand to hand like any other chattel, while others insist that a life insurance contract cannot be assigned to any one who has not an insurable interest in the life insured. The Supreme Court of Massachusetts thus reviews the authorities and deduces what is the most approved rule:<sup>5</sup> “In England the question was raised whether the assignment of a life insurance without interest was prohibited by the statute of 14 Geo. III., c. 48, which forbids any insurance on the life of a person in which the person for whose benefit the insurance is made has no interest, or by way of gaming or wagering, and it was held that such an assignment was valid.<sup>6</sup> Shadwell, V. C., said: ‘It appears to me that a purchaser for a valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured.’ The same has been held

<sup>1</sup> *Phoenix Mut. L. Ins. Co. v. Dunham*, 46 Conn. 79.

<sup>2</sup> *Brosard v. Marsonin*, 17 Low. Can. Jur. 270; *Vilbon v. Same*, 18 *Id.* 249.

<sup>3</sup> *Queb.* 33 Vic. c. 21.

<sup>4</sup> *Crosby v. Stephan*, 32 Hun, 478.

<sup>5</sup> *Mut. Life Ins. Co. v. Allen*, 138 Mass. 31.

<sup>6</sup> *Ashley v. Ashley*, 3 Sim. 149.

in New York, where a similar statute exists.<sup>1</sup> It has been decided in New York that insurance on a life in which the assured has no interest is void at common law, and that the statute of 14 Geo. III., c. 48, so far as it prohibits such insurance, is a declaratory act.<sup>2</sup> In Rhode Island, in a well considered case, decided in 1877, a sale and assignment of a policy of life insurance to one who had no interest in the life, made, not as a contrivance to circumvent the law, but as an honest and *bona fide* transaction, was held valid.<sup>3</sup> In *Cunningham v. Smith*,<sup>4</sup> a person took out an insurance on his own life, and paid for it with the money of the defendants, intending to assign the policy to the defendants, and did so assign it. The assignment was sustained. The court say that the defendants may have had such an interest in the life insured as would have entitled them to insure his life in their own name, although this was doubtful; but that the assured had an interest in his own life, 'and if he was willing to insure himself with their money and then assign the policy to them, there is no principle of law which can prevent such a transaction.' This transaction is obviously more open to objection than the assignment of the interest in a valid subsisting policy. In *Ætna Ins. Co. v. France*,<sup>5</sup> a brother procured an insurance on his life for the benefit of his married sister, who was in no way dependent upon him. It was held to be valid, and that it was immaterial what arrangement was made between them for the payment of the premium. In delivering the opinion of the court, Mr. Justice Bradley, referring to the case of *Connecticut Ins. Co. v. Schaefer*,<sup>6</sup> in which he delivered the

<sup>1</sup> *St. John v. American Ins. Co.*, 13 N. Y. (3 Kern.) 31; *Valton v. National Fund Ass. Co.*, 20 N. Y. 32.

<sup>2</sup> *Ruse v. Mutual Ben. Ins. Co.*, 23 N. Y. 516.

<sup>3</sup> *Clark v. Allen*, 11 R. I. 439.

<sup>4</sup> 70 Pa. St. 450.

<sup>5</sup> 94 U. S. 561.

<sup>6</sup> 94 U. S. 457.

opinion said: 'Any person has a right to procure an insurance on his life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from any such imputation.' Several cases have been cited as deciding that any assignment of a life policy to one who has no interest in the life is void. We will notice them briefly. *Cammack v. Lewis*<sup>1</sup> and *Warnock v. Davis*<sup>2</sup> were both cases in which the policies were taken out, by the procurement of the assignees, in order that they might be assigned to them, under such circumstances as that they might well be held to be in evasion of the law prohibiting gaming policies. The remark of Mr. Justice Field in the latter case that 'the assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name,' was not necessary to the decision. In *Franklin Ins. Co. v. Hazzard*,<sup>3</sup> the assured had failed to pay the premiums, and had notified the insurers that he should not keep up the policy. He afterwards assigned it for \$20, the insurer assenting and receiving the premiums. The assignment was held void, the court saying that such policies are assignable, but not 'to one who buys them merely as matter of speculation without interest in the life of the assured.' Neither of these cases decides, whatever *dicta* may have accompanied the decision, that all assignments without interest are illegal. The case last cited is affirmed in the case of *Franklin Ins. Co. v. Sefton*,<sup>4</sup> in which Chief Justice Worden, quoting from the opinion of the court in *Hutson v. Merrifield*<sup>5</sup>—that 'the party holding and owning such a

<sup>1</sup> 15 Wall. 643.

<sup>2</sup> 104 U. S. 775.

<sup>3</sup> 41 Ind. 116.

<sup>4</sup> 53 Ind. 380.

<sup>5</sup> 51 Ind. 24.

policy, whether on the life of another or on his own life, has a valuable interest in it which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action,' — says that it is not stated that it is assignable to a person incapable of receiving an assignment; and adds, 'It may be added that where the policy holder dies before the death of the party whose life is insured, perhaps the administrator of the holder could, for the purpose of converting the assets into money and settling up the estate in due course of law, sell the policy to any one who might choose to become the purchaser.' *Missouri Valley Ins. Co. v. Sturges*,<sup>1</sup> assumes and decides that the same objections lie to an assignment without interest as to an original insurance with no interest. The distinction between the two transactions is not considered. *Basye v. Adams*,<sup>2</sup> seems to decide, on the authority of *Warnock v. Davis*, *Cammack v. Lewis*, *Franklin Ins. Co. v. Hazzard*, and *Missouri Valley Ins. Co. v. Sturges*, *ubi supra*, that an assignment without interest is void as against public policy. The case of *Stevens v. Warren*,<sup>3</sup> decided in 1869, has been supposed to hold that an assignment of the right of the assured in a life policy to one who has no interest in the life, is void without regard to the circumstances and character of the particular transaction, and has been referred to in some of the cases just cited as an authority to that effect. We think that decision has been misunderstood, and that, in connection with other decisions of this court, it shows that the law in this Commonwealth accords with that laid down in *Clark v. Allen*.''<sup>4</sup> The court then examines *Campbell v. New England Ins. Co.*,<sup>5</sup> *Stevens v.*

<sup>1</sup> 18 Kan. 93.

<sup>2</sup> 81 Ky. 368.

<sup>3</sup> 101 Mass. 564.

<sup>4</sup> 11 R. I. 439.

<sup>5</sup> 98 Mass. 381.

Warren,<sup>1</sup> *Palmer v. Merrill*,<sup>2</sup> and *Troy v. Sargent*,<sup>3</sup> to show that assignments of life policies have been upheld when not covers for gambling transactions and concludes thus: "The general rule laid down in *Stevens v. Warren*, *supra*, 'that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life,' and from which the inference that an assignee of a party must have an insurable interest seems to have been drawn, we think, is not strictly accurate, or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy, but it is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease, the policy would continue, and the insured would then have an insurance without interest.<sup>4</sup> The value and permanency of the interest is material only as bearing on the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception, it will not be avoided by a cessation of the interest. The mere fact that the assured himself has no interest in the life does not avoid or annul the policy." It is believed that this doctrine is supported by the weight of authority, although some cases bear to the extreme that policies of life insurance are mere choses in action and others insist that the assignee must have an insurable interest in the life insured. In one case,<sup>5</sup> it was held that wager policies were not prohibited by the laws of New Jersey. In *Kansas* the Supreme Court held that a policy of life insurance, assigned for a valuable consideration to one who did not have an in-

<sup>1</sup> 101 Mass. 564.

<sup>2</sup> 6 Cush. 282.

<sup>3</sup> 132 Mass. 408.

<sup>4</sup> *Dalby v. India & London Assn. Co.*, 15 C. B. 365; *Law v. London Policy Co.*, 1 Kay & J. 223; cited in *Loomis v. Eagle Ins. Co.*, 6 Gray, 396; *Conn. Mut. Life Ins. Co. v. Schaefer*, *supra*; *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Provident Ins. Co. v. Baum*, 29 Ind. 236.

<sup>5</sup> *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. (4 Zab) 576.

## § 303 CHANGE OF BENEFICIARY: ASSIGNMENT.

insurable interest, was worthless and void not only in the hands of the assignee but in the hands of the beneficiaries and their assignee.<sup>1</sup>

**§ 303. Validity of Assignment, how Determined: Amount of Recovery by Creditor and Assignee.**—The validity of the assignment is determined by the law of the domicile of the parties or the place where made.<sup>2</sup> Proof that the assignee of a life insurance policy caused the death

<sup>1</sup> *Missouri Valley Life Ins. Co. v. McCrum*, 36 Kan. 146; 12 Pac. Rep. 517. In the following cases the assignments of policies of life insurance have been sustained, although to one not having an insurable interest: *Palmer v. Merrill*, 6 Cush. 282; 52 Am. Dec. 782; *St. John v. American, etc., Ins. Co.*, 2 Duer, 419; 13 N. Y. 31; *Valton v. Natl. Fund L. Ins. Co.*, 20 N. Y. 52; *Rawls v. American L. Ins. Co.*, 36 Barb. 357; 27 N. Y. 282; *Olmstead v. Keyes*, 85 N. Y. 593; *Hogle v. Guardian L. Ins. Co.*, 6 Robt. 567; *Fairchild v. Northeast M. L. Ins. Co.*, 51 Vt. 613; *Ashley v. Ashley*, 3 Sim. 149; *Lamont v. Hotel Men's, etc., Assn.*, 30 Fed. Rep. 817; *Murphy v. Red*, 64 Miss. 614; 1 South. Rep. 761; *Bloomington M. L. Assn. v. Blue*, 120 Ill. 121; 11 N. East. Rep. 331; 8 West. Rep. 642; *N. Am. Ins. Co. v. Craigen*, 6 Russ. & G. (Nov. Sc.) 440; *Eckel v. Renner*, 41 Ohio St. 232; *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24; *Cannon v. N. W. Mut. L. Ins. Co.* 29 Hun, 470; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Clark v. Allen*, 11 R. I. 439; *Bursinger v. Bank of Watertown*, 67 Wis. 76. In *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272, it was left to the jury to say whether the policy was a wagering one or not. In the following cases the want of insurable interest was held to vitiate the assignment: *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; approving *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116; *Settle v. Hill*, 5 Ky. L. Rep. 691; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. St. 446; 19 W. N. C. 248; 7 Cent. Rep. 204; 8 Atl. Rep. 638; *Ala. Gold L. Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329; 1 South. Rep. 561; *Price v. Knights of Honor*, 68 Tex. 361; 4 S. W. Rep. 633; *Downey v. Hoffer*, 16 W. N. C. 184; *Wegman v. Smith*, *Id.* 186; *Stoner v. Line*, *Id.* 187; *Meily v. Hershberger*, 16 W. N. C. 186; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643; *Missouri Vall. L. Ins. Co. v. Sturges*, 18 Kan. 93; *N. Y. Life Ins. Co. v. Parent*, 3 Que. L. R. 163; *Same v. Talbot*, *Id.* 168; *Michaud v. British Med. Assn.*, *Ramsey's App. Cas.* (Low. Can.) 377; *Baye v. Adams*, 81 Ky. 368; *Missouri Vall. L. Ins. Co. v. McCrum*, 36 Kan. 146; 12 Pac. Rep. 517; *Ruth v. Katterman*, 112 Pa. St. 251; 2 Cent. Rep. 776; 3 Atl. Rep. 833; *Gilbert v. Moose*, 104 Pa. St. 74.

<sup>2</sup> *Mut. L. Ins. Co. v. Allen*, 138 Mass. 24.



of the insured by felonious means is sufficient to defeat a recovery on the policy.<sup>1</sup> Unless there is a gross discrepancy between the amount of the policy and the debt, the assignee of the policy can recover the full amount of the latter.<sup>2</sup> If the debt is small and the insurance large the insurance will be treated as security or indemnity only.<sup>3</sup> And the personal representatives may recover the excess over the debt.<sup>4</sup> It has, however, been strongly insisted that the rights of a creditor to a policy of life insurance on the life of his debtor are always limited to the amount of the debt. In *Armstrong v. Mutual Life Ins. Co.*<sup>5</sup> it was said: "The assignment could not rise higher than the instrument assigned and further the instrument itself limits the rights to be passed to the assignees. Such right could not extend beyond an interest in the life of the assured which could be proved. If the interest was that of a creditor it would be limited by the amount of his probable debt. As no debt is shown no interest is shown, and nothing is shown to have passed to the assignee."<sup>6</sup> If a policy be

<sup>1</sup> *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591.

<sup>2</sup> *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn. 244; *Trenton Ins. Co. v. Johnson*, 24 N. J. L. 581; *Amick v. Butler*, 111 Ind. 578; 9 West. Rep. 842; 12 N. East. Rep. 518; *Grant v. Kline*, 115 Pa. St. 618; 9 Atl. Rep. 150; 7 Cent. Rep. 626; *Hoyt v. N. Y. Life Ins. Co.*, 3 Bosw. 440; *St. John v. Am. Mut. Ins. Co.*, 2 Duer, 419; *Miller v. Eagle Ins. Co.*, 2 E. D. Smith, 268; *Grattan v. Natl. L. Ins. Co.*, 15 Hun, 74; *Ferguson v. Mass. Mut. L. Ins. Co.*, 32 Hun, 306, *affd.* 102 N. Y. 647.

<sup>3</sup> *Cammack v. Lewis*, 15 Wall. 643; *Am, etc., Ins. Co. v. Robertshaw*, 26 Pa. St. 189; *Courtenay v. Wright*, 2 Giff. 337. See *Hebden v. West*, 3 Best & S. 579; 9 Jur. (N. S.) 747; 32 L. J. Q. B. 85; 7 L. T. (N. S.) 854 where it is held that where two policies of life insurance are founded on the same insurable interest recovery on one bars recovery on the other.

<sup>4</sup> *Siegrist v. Schmoltz*, 18 W. N. C. (Pa.) 321; 6 Atl. Rep. 47; 5 Cent. Rep. 230; *Helmetag v. Miller*, 76 Ala. 183.

<sup>5</sup> 11 Fed. Rep. 573.

<sup>6</sup> The court cites *Cammack v. Lewis*, 15 Wall. 643; *Thatch v. Metropole Ins. Co.*, 11 Fed. Rep. 29. This case, cited in the text, was afterwards reversed by the Supreme Court of the United States; *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, but chiefly on account of errors in

assigned to one without interest, or if, for any reason, the assignment is held void or imperfect, so that it does not pass the fund to the assignee, the latter has in equity a lien on the policy for the amount of premiums he has paid, with interest.<sup>1</sup> But payments made by a stranger to the contract give him no lien or claim to the insurance money.<sup>2</sup>

§ 304. **Distinctions between Certificates of Beneficiary Societies and Policies of Life Insurance in Respect to Assignment or Changes of Beneficiary.** — The Supreme Court of Indiana<sup>3</sup> points out the fundamental difference between a certificate of membership in a benefit association and an ordinary policy of life insurance so far as the change of beneficiary and assignment are concerned. As regards the former the designation is an appointment, subject generally to revocation; in the latter one party to a contract exercises his rights under such contract. In the above mentioned case the court says: "Whatever rights beneficiaries have in life policies, they have by virtue of the contract between the insurance company and the assured. In the case of an ordinary insurance policy, the right of the beneficiaries in the policy, and to the amount to be paid upon the death of the assured, is a vested right, vesting upon the taking effect of the policy. That right cannot be defeated by the separate, or the combined, acts of the assured and insurance company without the consent of the

admission of testimony. The court said that life insurance policies are assignable if not made to cover speculative risks and payment thereof may be enforced for the benefit of the assignee.

<sup>1</sup> Conn. Mut. Life Ins. Co. v. Burroughs, 34 Conn. 305; Weisert v. Muehl, 81 Ky. 341; City Savings Bank v. Whittle, 63 N. H. 587; Unity Association v. Dugan, 118 Mass. 219.

<sup>2</sup> Lockwood v. Bishop, 51 How. Pr. 221; Burridge v. Rowe, 1 Y. & C. C. C. See *ante*, § 248, *et seq.*; *post*, §§ 312, 397.

<sup>3</sup> Holland v. Taylor, 111 Ind. 125; 12 N. East. Rep. 116; 9 West. Rep. 606.

beneficiary.<sup>1</sup> As in other cases, so here, whatever right or power Taylor, the assured, had to and over the certificate, was by virtue of the terms of the certificate and the by-laws of the order, which together constituted the contract between him and the order. And whatever rights the beneficiary, Anna Laura, had, or now has, to the fund to be, and in this case paid, upon the death of the assured, her father, she had, and has, by virtue of the same contract. It should be observed that the Royal Arcanum is not a domestic corporation, and hence not affected by § 3848 R. S. 1881.<sup>2</sup> If, then, the Royal Arcanum were to be treated as an ordinary life insurance company, and the certificate as an ordinary life policy, it would be clear that Taylor, the assured, had no authority, by will or otherwise, to change the beneficiary, or in any way affect her rights without her consent. For many, and indeed, for most purposes, mutual benefit associations are insurance companies, and the certificates issued by them are policies of life insurance governed by the rules of law applicable to such policies. There are, however, some essential differences usually existing between the contracts evidenced by such certificates and the ordinary contract of life insurance.<sup>3</sup> The most usual difference is the power, on the part of the assured in mutual benefit associations to change the beneficiary. But as in either case the rights of the beneficiary are dependent upon and fixed by the contract between the assured and the company or association, there seems to be no reason why the assured should have any greater power to change the beneficiary in one case than in the other, except as that power may be inherent in the nature of the

<sup>1</sup> *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285; *Damron v. Penn. Mut. L. Ins. Co.*, 99 Ind. 478.

<sup>2</sup> *Presb. Ass. Fund v. Allen*, 106 Ind. 593.

<sup>3</sup> *Presb. Mut. Ass. Fund v. Allen*, *supra*; *Elkhart Mut. Aid Assn. v. Houghton*, 103 Ind. 286; 53 Am. Rep. 514; *Bauer v. Sampson Lodge, etc.*, 102 Ind. 262.

association, or is reserved to him by the constitution, or by the laws of the association or by the terms of the certificate. In the case before us, the right and power of the assured, Taylor, to change the beneficiary was reserved to him by the by-laws of the order, and recognized in the certificate. Because of that reservation, the beneficiary, Anna Laura, did not have a right in and to the certificate, and the amount to be paid upon the death of the assured vested in such a sense that it could not be defeated. But it would be saying too much to say that she had no rights. She was the beneficiary named in the certificate. The executors, so far as shown by the terms of the certificate, had no right at all either in or to the certificate, or to the amount to be paid by the association. So far as shown by that certificate, they were mere trustees to collect the amount for the use and benefit of the real beneficiary, Anna Laura. So long as the contract remained as executed, she had the right of a beneficiary, subject to be defeated by a change of the beneficiary by the assured. So long as the certificate remained as executed, the assured had reserved to himself the power to change the beneficiary, and that was the extent of his right in, or power over, the certificate, or the amount agreed to be paid at his death. He had no interest in or to either the certificate or the amount agreed to be paid, that would have gone at his death to his personal representatives. By virtue of the by-laws and the certificate, which, as we have seen, constituted the contract between him and the Royal Arcanum, he had power to change the beneficiary.”

§ 305. Development of the Law Concerning Change of Beneficiary.—In one of the earliest cases involving the right of a member of a benefit society to change his designation of a beneficiary,<sup>1</sup> the change was allowed for two reasons:

<sup>1</sup> 1877, *Durian v. Central Verein*, 7 Daly, 168.

one being that the laws of the organization permitted it and the second being the same given by the Supreme Court of Connecticut in sustaining an alteration and substitution of beneficiaries in a policy of life insurance,<sup>1</sup> viz.: that the evidence of the contract, the policy, had not been delivered to the beneficiary so as to become an executed settlement in favor of the latter.<sup>2</sup> The doctrine of executed settlement was the stumbling block in the way of holding from the first that a member of a benefit society might at pleasure change the beneficiary to another than the one first designated; but in a later case<sup>3</sup> it was avoided in the same way as in the New York case just cited, by holding that there was no valid executed transfer by delivery. In this case the Supreme Court of Tennessee said: "By the charter of the Knights of Honor, as we have seen, the benefit fund of a member 'shall be paid to his family, or as he may direct,' and by the constitution he may direct the payment 'by will, entry on the reporter's record book, or benefit certificate.' Of course, a direction by will may be changed at any time before the death of the party, and the constitution of the order expressly provides for a similar change in the case of an entry on the record book. The benefit certificate only certifies the fact that the member named is entitled to the benefit fund, and the form in the lower left hand corner, when filled up, is only a direction to whom payment is to be made. There is no reason for supposing that such a direction in the certificate should have any other effect than a direction on the record book, or a will. In fact, the form is a will. 'It is my will' that the benefit shall be made to the person named. Such an instrument, attested by two witnesses, might be proved as a will of the fund

<sup>1</sup> *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 301.

<sup>2</sup> See *Deady v. Bank Clerks' M. B. A.*, 17 Jones & Sp. 246; *Johnson v. Van Epps.*, 14 Bradw. 201; 110 Ill. 551.

<sup>3</sup> *Tennessee Lodge v. Ladd*, 5 Lea, 716.

under our law.<sup>1</sup> No doubt the language was adopted for the express purpose of obviating a difficulty which might arise upon a simple direction as to whether it could have effect as an assignment without delivery. The execution of such an instrument, without more, would not divest the member of his interest in the fund, nor vest the fund in the person to whom it is directed to be paid. It would still be the fund of the member and subject to his disposal. This court has held that a husband who takes out a policy of insurance on his own life in his own name, is entitled to treat it as his property and dispose of it by will.<sup>2</sup> If he take the policy in the name of his wife, intending to give her the benefit of it, she would thereby acquire a vested interest of which he could not afterwards deprive her.<sup>3</sup> The same rule would undoubtedly apply where he voluntarily assigned to his wife, by an executed contract, a policy taken out payable to himself.<sup>4</sup> A benefit certificate, like the one before us, would be governed by the same rule, and would remain the property of the husband, subject to disposition by will unless previously assigned for a valuable consideration, or voluntarily transferred by an executed contract.<sup>5</sup> In this view, the 'will' of W. E. Ladd, in the direction on the face of the last certificate, would carry the right to his daughter, unless the evidence shows a valid executed transfer to the wife of the first certificate. Her testimony fails, unfortunately, to establish either the necessary intention or the requisite delivery." About the same time the Supreme Court of Illinois came to a similar conclusion for a different reason.<sup>6</sup> In this case the certificate and laws of

<sup>1</sup> *McLean v. McLean*, 6 Humph. 452.

<sup>2</sup> *Rison v. Wilkerson*, 3 Sneed, 565; *Williams v. Carson*, 2 Tenn. Ch. 269; affirmed on appeal.

<sup>3</sup> *Gosling v. Caldwell*, 1 Lea, 454.

<sup>4</sup> *Fortescue v. Barnett*, 3 Myl. & K. 36.

<sup>5</sup> *Weil v. Trafford*, 3 Tenn. Ch. 103.

<sup>6</sup> *Swift v. Railway, etc.*, Ben. Assn., 96 Ill. 309.

the society provided that the benefit might be disposed of by will, if not so disposed of it should go first to the widow, or if he had no widow, then to his heirs. The member made his will leaving the benefit to his two daughters; afterwards, by a paper held to amount to an equitable assignment, he gave the benefit to his wife if she would pay certain assessments. In holding the assignment good the court said: "It is strenuously insisted that this contract was of such a character that it could not be assigned, even equitably by Clark Swift. We think otherwise. Neither the wife nor children had any vested interest, conditional or otherwise, in this insurance money so long as Clark Swift lived and owned and controlled this contract. The contract was between the association and himself. The children paid nothing for their supposed interest. The certificate had not been delivered or sold to them. The delivery to White made him bailee for Swift. It was a contract which was capable of being rescinded by Clark Swift, with the assent of the association. It is not conceived that he had not complete control over it, to the same extent that he might have controlled a promissory note payable to him. The will, of course, was of no effect until he died. At the time of his death, he held no interest in that part of the money to arise from the contract relating to his death, which could pass to the executor by the will. That interest had been sold. It was assignable in equity, and had been assigned to and paid for by the wife." In 1881 the Supreme Court of Minnesota held that that the beneficiary under a membership in a benefit society could be changed at the pleasure of the member because the contract permitted it, the reservation of such power being made in the laws of the society. In this case<sup>1</sup> the court said: "Here is not an ordinary contract of insurance, made between an insurance company and another person, the rights of the

<sup>1</sup> *Richmond v. Johnson*, 28 Minn. 449.

parties to be determined exclusively by the policy. The rights of Charles H. Richmond, and of any one claiming through him, depended, not on the certificate alone, but rather on his membership in the association; and such rights were defined and controlled by its constitution and by-laws.”

§ 306. **Present Doctrine.**—And the accepted doctrine, now generally approved by all the authorities, is that the beneficiary may be changed if the laws of the order so provide, or if, when such transfer is not prohibited by the laws of the society, the certificate or policy has not been delivered to the beneficiary.<sup>1</sup> The Supreme Court of New Hampshire goes further and <sup>2</sup> holds that from the nature of the power given members of benefit associations the right of its free exercise requires its continuance until death. The court says: “The contract, though one of life insurance, must be interpreted according to its terms, in view of the laws of the defendant association and of the evident understanding of the parties. The by-laws provide that ‘when a member dies, the association shall pay within sixty days, to his direction as entered upon his certificate of membership, the sum of two thousand dollars,’ if the death assessments amount to that sum. The certificate of membership provides that ‘in accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid by the association as a bene-

<sup>1</sup> Cases *supra*; *Holland v. Taylor*, 111 Ind. 121; *Ireland v. Ireland*, 42 Hun, 212; *Supreme Lodge v. Martin*, 13 W. N. C. 160; *Splawn v. Chew*, 60 Tex. 532; *Highland v. Highland*, 109 Ill. 366; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Raub v. Mut. R. Assn.*, 3 Mackey, 68; *Lamont v. Hotel Mens' Assn.*, 30 Fed. Rep. 817; *Barton v. Provident Mut. R. Assn.*, 63 N. H. 535; *Schillinger v. Boes*, 9 Ky. L. Rep. 18; 3 S. W. Rep. 427; *Masonic Mut. Ben. Assn. v. Burkhardt*, 110 Ind. 189; 11 N. East. Rep. 449; 7 West. Rep. 527; *Sup. Council Catholic Mut. Ben. Assn. v. Priest*, 46 Mich. 429; *Gentry v. Sup. Lodge*, 23 Fed. Rep. 718; 20 Cent. L. J. 393; *Supreme Council Am. Leg. of Honor v. Perry*, 140 Mass. 580.

<sup>2</sup> *Barton v. Provident R. Assn.*, 63 N. H. 535; 1 New Eng. Rep. 856.



fit, upon due notice of his death and the surrender of the certificate, to such person or persons as he may by entry on the record-book of the association or on the face of this certificate, direct, said sum to be paid provided he is in good standing when he dies.' The power of direction as to the object of the benefit is given to the member both in the by-law and in the certificate of membership, and there is nothing in either tending to show that the power is to be exercised at the time of becoming a member, or that, when exercised the power is exhausted and another beneficiary cannot be substituted. The power of selection is unlimited as to persons and is limited in time only by the death of the member. The certificate remains in the possession and control of the member until death, and the provision for paying the benefit to the person named in the certificate at the death of the member, as then appears, leaves the power to appoint the beneficiary continuous until that event. The power of appointment is the one thing in the contract which is given to the member, and over that power no other person has any control. The right of its free exercise requires its continuance until death. The appointment by Barton of the plaintiff, his wife, to the benefit at the time he became a member, was no bar to his right to appoint another or others by a subsequent change. She was no party to the contract, and acquired no vested right in the benefit. The contract was between Barton, her husband, and the defendant, which, on the performance of the conditions of membership, agreed to pay the benefit to any person whose name might appear by his entry on the record-book or the face of the certificate at his death. The power of appointment being free and continuous, no right to the benefit could vest in the plaintiff until it became certain that her name remained in the certificate as beneficiary, at her husband's death. If by the entry of her name as beneficiary, the plaintiff acquired any interest whatever in the benefit it was only a

contingent interest, which her husband had the power to defeat, and which he has defeated by exercising the power of substitution in the appointment of other beneficiaries." The principle declared in the preceding case<sup>1</sup> is undoubtedly correct, and follows most closely the precedents relating to the execution of powers. If designating a beneficiary is like executing a will, a stronger argument in favor of the rule is found, for from its very nature a will, whether executing a power, or disposing of ordinary property, is ambulatory and liable to be revoked.<sup>2</sup> And in the best considered cases this characteristic of a benefit appurtenant to membership in a benefit society is recognized.<sup>3</sup> The right to change the beneficiary is not affected by the fact that the first beneficiary paid the assessments of the member and the change was made without his consent.<sup>4</sup>

§ 307. **Change of Beneficiary must be in Way Prescribed by the Laws of the Society.** — Although the member of a benefit society is thus generally left free to revoke his designation of beneficiary and appoint a new one, he must do so in the way pointed out by the laws of the organization. It is but carrying out the rule laid down in regard to powers, that if a method of revocation of an appointment is created by the instrument conferring such power, this direction must be complied with. If the laws of the society prescribe certain formalities to be observed in the change of beneficiary, or if the assent of the society to a transfer is required, all the requirements must be obeyed. The Supreme Court of Indiana says<sup>5</sup> that the

<sup>1</sup> *Barton v. Provident R. Assn.*, *supra*.

<sup>2</sup> *In re Davies*, 13 Eq. Cas. 163; *Oke v. Heath*, 1 Ves. 135; *Easum v. Appleford*, 5 M. & C. 56; *Lord Godolphin's Case*, 2 Ves. 78.

<sup>3</sup> *Relief Association v. McAuley*, 2 Mackey, 70; *Masonic Mut. Ben. Soc. v. Burkhardt*, 110 Ind. 189; *ante*, § 291.

<sup>4</sup> *Fisk v. Equitable Aid Union (Pa.)*, 11 Atl. Rep. 84; 9 Cent. Rep. 403.

<sup>5</sup> *Holland v. Taylor*, 111 Ind. 127.

same contract that permits the change "fixed the mode and manner in which that change might be made, and we think that, taking the by-laws and the certificate together, the mode and manner of changing the beneficiary was fixed as definitely, and was as binding upon the assured, as was the right to make such change binding upon the association and the beneficiary. In other words, under the contract, the assured had a right to change the beneficiary, provided he made the change in the manner provided in the contract." So, the Supreme Court of Iowa says:<sup>1</sup> "The contract between the association and Robert Stephenson was that the former should pay the insurance to the persons named in the certificate of membership, unless he should change the name of the beneficiaries; and the manner in which this should be done formed a part of the contract of insurance. \* \* \* Until the contemplated change was made on the books of the association, and a new certificate issued, the obligation to pay the beneficiary whose name appeared on the books of the association continued to exist. \* \* \* Counsel for the plaintiffs insist that where a power is reserved, and no mode of executing it is provided, it may be executed by will. Possibly this is so, but whether so or not, it will be conceded for the purpose of this case. One difficulty in the application of such a rule to this case is, that a mode of executing the reserved power is provided in the contract, and it is conceded that such a mode was not adopted. It was perfectly competent for the parties to contract as they did, and the mode of executing the reserved power provided in the contract cannot be regarded as an idle ceremony, because substantially a new contract was made upon its being complied with, and thereby all doubt upon the part of the association as to who was the beneficiary was removed. Because such mode was not adopted in this case, creates the doubt we are called

<sup>1</sup> Stephenson v. Stephenson, 64 Ia. 534; 21 N. W. Rep. 19.

upon to solve. We, therefore, think the mode agreed upon in the contract, whereby the name of the beneficiary should be changed, was made a matter of substance, and should be complied with." In most of the cases where the method of change of beneficiary was drawn in question the member had attempted to either divert the benefit by will, or the assent of the society to the change was required and had not been obtained, and thereby the attempted change was abortive. The rule above laid down has been generally accepted.<sup>1</sup> The mention of one method of change has been held to impliedly or expressly exclude all others on the ground that, "*expressio unius est exclusio alterius.*"<sup>2</sup> Where a member of a benefit society becomes suspended for non-payment of assessments, he may, in his application for reinstatement, designate a new beneficiary, and the society in readmitting him acquiesces in the change.<sup>3</sup> Inasmuch as the beneficiary has no vested rights in the certificate of a benefit society resulting from the assured's membership therein, not being a party to the contract, he cannot complain that a by-law, in existence at the time the certificate was issued, providing the member may surrender the certificate, and receive a new one, with the consent of the beneficiary, was amended so as to allow such surrender and

<sup>1</sup> National Mutual Aid Society v. Lupold, 101 Pa. St. 111; Gentry v. Knights of Honor, 23 Fed. Rep. 718; 20 C. L. J. 393; Ireland v. Ireland, 42 Hun, 212; Knights of Honor v. Nairn, 60 Mich. 44; 26 N. W. Rep. 826; Vollman's Appeal, 92 Pa. St. 50; Elliott v. Whedbee, 94 N. C. 115; Highland v. Highland, 109 Ill. 366; Greeno v. Greeno, 23 Hun, 478; Kentucky Masonic M. Ins. Co. v. Miller, 13 Bush, 489; Manning v. Supreme Lodge A. O. U. W., 5 S. W. Rep. 385; 7 Ky. Law Rep. 751; Renk v. Herrman Lodge, 2 Demar. 409; Olmstead v. Masonic Mut. Ben. Soc., 37 Kan. 93; 14 Pac. Rep. 449; Basye v. Adams, 81 Ky. 368; Daniels v. Pratt, 143 Mass. 216; Harman v. Lewis, 24 Fed. Rep. 97, 530; Eastman v. Provident Mut. Assn. (N. H.) 20 C. L. J. 266; Hotel Men's M. Ben. Assn. v. Brown, 33 Fed. Rep. 11.

<sup>2</sup> Coleman v. Knights of Honor, 18 Mo. App. 189; Olmstead v. Masonic Mut. Ben. Soc., 37 Kan. 93.

<sup>3</sup> Davidson v. Knights of Pythias, 22 Mo. App. 263.

change without the consent of the beneficiary, the constitution of the society providing that its by-laws might be amended at any time.<sup>1</sup> A benefit certificate, subject by the laws of the order to change at will, on the compliance with certain formalities and the surrender of the old certificate, may be changed in the prescribed way, although it had been delivered to a third party who paid the assessments and was obtained from him without his consent.<sup>2</sup>

§ 308. **The Opposing View.**—The courts of Texas and Kentucky take a different view. This dissent and the reasons supporting it will appear from the following extracts from the opinions. In *Splawn v. Chew*,<sup>3</sup> which was a controversy between the original beneficiary, named in the certificate, and the devisee of the same benefit in the will of the member subsequently made, the Supreme Court of Texas said: “The right to change the disposition of [the] money being established in the member, the next question is, how is it to be exercised? It is contended by appellees that it can be exercised only in the manner pointed out in the third section of the third by-law, which reads as follows: ‘Members may at any time, when in good standing, surrender their certificate, and have a new one issued, payable to such beneficiary or beneficiaries dependent upon them as they may direct, upon payment of a certificate fee of fifty cents.’ This section is in further recognition of the right to make the alteration, and it seems to be admitted that a surrender of the old certificate and the issuance of a new one under this section would effect a change in the beneficiaries of the policy. But is this the only way in which such a change can be effected? The right to make the change is given by a different section of the by-laws, and exists in the insured so long as he remains a member of the

<sup>1</sup> *Byrne v. Casey* (Tex.), 8 S. W. Rep. 38.

<sup>2</sup> *Fisk v. Equitable Aid Union* (Pa.), 11 Atl. 84; 9 Cent. Rep. 403.

<sup>3</sup> 60 Tex. 532.

order. A method by which he may accomplish it to the satisfaction of the order is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company are entitled to know who are the parties entitled to the benefit money, and this is an effectual and certain means of giving that information. But like all such provisions in the by-laws of private corporations, it may be waived at the option of the corporation, being for its benefit alone. This has been held in reference to such provisions when prescribed in mandatory terms. If they can be waived in such cases, much stronger would seem to be the reason why this can be done when the course to be pursued is directed, as in this instance, in permissive language alone. \* \* \* As a by-law of the order this provision entered into the understanding between the company and the member effecting the insurance, and the rights of interested parties are not strengthened by the fact that the same provision is found in the certificate. It is still a condition for the benefit of the company, to be insisted upon or waived according to their election." In the Kentucky case,<sup>1</sup> the laws of the order provided that a member might at any time change the beneficiary by revoking the first designation and designating a new beneficiary in a form given on the back of the certificate, having the same attested by the recorder of the subordinate lodge with its seal thereto attached, and paying a fee of fifty cents for a new certificate, which was thereupon to be issued by the supreme lodge upon receipt from the local lodge of this old certificate, the attested revocation and the fee. In this case the member had left the certificate in charge of the local lodge. Subsequently he married and wrote the lodge inclosing his dues and requesting the officer to send him the certificate made

<sup>1</sup> Manning v. Ancient Order of United Workmen, 5 S. W. Rep. 385.

out to his wife. No fee was sent and the officer of the lodge wrote to him for it. Nothing was done until after the death of the member when the recorder of the lodge certified the letter to the supreme lodge, which issued the new certificate as requested and afterwards paid it. The suit was by the first beneficiary; judgment was given by the lower court for the defendant and in affirming this the Court of Appeals said: "The appellant had but a contingent right to the benefit; not a vested and absolute one. It was subject to be defeated at the will of the assured. The law of the order, as above cited, provides how this shall be done. The regulation is a reasonable one; but the question arises whether it shall govern as between claimants to the benefit, the order has seen fit to waive it. We think not. Its object, beyond doubt, was to prevent the appellee from becoming involved in litigation with outside claimants. Upon this idea it was held in the case of *Aid Society v. Lupold*,<sup>1</sup> that where the certificate provided, 'This certificate may be assigned and transferred only by and with the consent of the association indorsed thereon,' and it was done without such approval, that it was a part of the contract, and that the *society* had a right to insist upon the protection which it was intended to afford. The direction by the insured to change the benefit was, in the case now under consideration, given through the proper channel. The subordinate lodge referred it to the proper authority and it saw fit to waive the regulations intended for its benefit, and comply with the direction although made in an informal manner and without the payment of the fee. The intention of the insured was to change the benefit. He so directed in writing; and now, because he did not do so in the formal manner prescribed by the law for the benefit of the order, it is asked by a third party, whose interest in the insurance was liable to end at any time at the will of the assured, that his intention shall

<sup>1</sup> 101 Pa. St. 111.

be defeated, although the party, for whose benefit the form was prescribed, has seen proper to waive it. Such a rule would sacrifice substantial justice to mere form; it would tend to defeat the benevolent aim and purpose of the organization, and the desire and intention of the insured. Members of the order may be remote from their lodges; they may not have their certificates with them, and therefore be unable to make the indorsement thereon as directed, or to have it attested by the recorder of their lodge, or its seal attached thereto. If the appellee chooses to waive these formalities, it does not lie in the mouth of a third party to complain. The order is entitled to know who is entitled to the benefit fund, and the formal mode of changing its direction is for its benefit; while, upon the other hand, the right of the beneficiary rests in the mere will of the assured. \* \* \*

In our opinion, the letter of June 5, 1879, operated to change the direction of the benefit, inasmuch as the appellee saw fit to waive its informality; and, as the assured had therefore done all that was needed on his part, the fact that the appellee issued the new certificate after his death, does not affect the right of the parties. If the appellee were in court with the fund, asking that the conflicting rights of the claimants to it be determined, and was silent as to the informality of the direction to change the benefit, it seems to us that the widow ought to prevail." The facts of the above case would seem to have justified the interference of equity to carry out the intention of the member, so clearly expressed, but imperfectly executed;<sup>1</sup> but the reasons given and the conclusions reached as to the law, as in the Texas case just cited,<sup>2</sup> are in decided conflict with the weight of authority. In a few other cases the courts seem inclined to take the view that the method prescribed for the change of beneficiary is not exclusive of all others, but careful exam-

<sup>1</sup> *Post*, § 310.

<sup>2</sup> *Splawn v. Chew*, *supra*.



ination shows that under the terms of the contracts in such cases there was room for this construction. Thus, in *Raub v. Relief Association*,<sup>1</sup> it was held that a by-law requiring the assent of the society to any change of beneficiary, was void because the charter gave the right to dispose of the benefit by will and without the assent of the lodge. In *Catholic Benefit Association v. Priest*,<sup>2</sup> a disposition by will was sustained because the record did not show any law of the society taking away such right. In a Georgia case,<sup>3</sup> a defective transfer to a wife was upheld on the ground of estoppel, for though the assent of the company was required to make an assignment valid, the agent of the company had agreed to attend to it.

§ 309. **When an Attempted Change of Beneficiary Becomes Complete.** — It often becomes important to know when an attempted change of beneficiary becomes complete. In general, the method is for the member to fill out a blank form on the back of the certificate, revoking his former and making a new direction of payment, and have the same attested by the secretary of the lodge, who forwards the same to the superior authorities, who thereupon cancel the old and issue a new certificate payable as requested. It is possible for the member to die before the various steps in the transaction have all been taken. In one case<sup>4</sup> the member requested a friend to take his certificate to the secretary of the lodge and have him attest and complete the change; but before this was done and before the old certificate was delivered to the secretary, the member died. It was held that the change was incomplete and the old beneficiary recovered. In a Michigan case<sup>5</sup> the

<sup>1</sup> 3 Mackey, 68.

<sup>2</sup> 46 Mich. 429.

<sup>3</sup> *Nally v. Nally*, 74 Ga. 669.

<sup>4</sup> *Ireland v. Ireland*, 42 Hun, 212.

<sup>5</sup> *Knights of Honor v. Nairn*, 60 Mich. 44.

Supreme Court of that State, in declining to pass fully on the question, said: "By the express terms of that certificate, it is provided that Mrs. Richardson shall have the money unless the certificate is surrendered and cancelled and a new one issued; and the form of surrender printed on the back conforms precisely to the clause also inserted in the constitution, requiring every surrender and new direction to be signed by the member, and attested by the reporter under the lodge seal, he being the officer into whose hands it must be placed for transmission to the home office for reissue. Under this arrangement, the purpose is evident that the corporation shall always be in written contract relations with a member who is alive and in good standing, which will show them the identity of the beneficiary to whom they are liable. It is possible — and we need not consider under what circumstances — that when a member has executed and delivered to the reporter his attested surrender, in favor of a competent beneficiary, his death before a new certificate is rendered, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident. But in the present case the facts show conclusively that Traver did not mean to have any surrender made until after his death." In a case in Missouri,<sup>1</sup> a member of a benefit society was severely injured and desired a friend to take his certificate to the secretary of the lodge and have it changed. The friend did this, and the next day called at the central office and received the new certificate. At the time of issue of the latter the member was dead. The court held that, it not appearing that the officers who issued new certificates to members had any right to refuse, if the request was in form, but had merely ministerial duties in that respect, the transfer was good; for the member had done all that lay in his power to effect the change before he died. The Su-

<sup>1</sup> National Am. Assn. v. Kirgin, 28 Mo. App. 80.

preme Court of Pennsylvania has held,<sup>1</sup> that a new benefit certificate issued to change the beneficiary, upon application made in accordance with the by-laws of the association and signed by the proper officers of the Supreme lodge and sealed with its seal, is not invalid because not signed and sealed by the officers of the subordinate lodge.

§ 310. **Jurisdiction of Equity in Aid of Imperfect Change of Beneficiary.** — The inquiry is suggested by the last section, and the cases therein cited, to what extent equity will aid an imperfect change of beneficiary. In a recent case the Supreme Court of Michigan considered the subject.<sup>2</sup> The facts of the case were as follows: By the laws of the order a member might at pleasure revoke his appointment of a beneficiary and designate a new one by signing a declaration to that effect on the back of the certificate; such declaration was to be attested by the recorder of the subordinate lodge and the lodge seal affixed; it was then to be sent by such recorder, with the prescribed fee, to the grand lodge officers, who cancelled the old and issued a new certificate as requested. One Child became a member and designated his betrothed as beneficiary, he having a son then living. The certificate was exhibited to the beneficiary, but retained by the member and afterwards lost. Sixteen months after the issue of the certificate the lady designated as the beneficiary married another person than Child. The latter afterwards continued to pay his assessments and tried, by a written document, to change the designation and make his son the beneficiary, but the grand lodge refused to recognize the change, or issue a new certificate unless the first one was surrendered; the subordinate lodge, however, advised the written document, expressing the intention of the member, and consented to it. After

<sup>1</sup> Fisk v. Equitable Aid Union, 11 Atl. Rep. 84; 9 Cent. Rep. 403.

<sup>2</sup> Grand Lodge A. O. U. W. v. Child, 38 N. W. Rep. 1; 14 West. Rep. 454.

the death of the member the grand lodge filed a bill of interpleader against the first beneficiary and the son and paid the money into court. In awarding the fund to the son the court said. "It clearly appears that the deceased, while living, never intended, after Miss Drury married O'Connor, that she should remain the beneficiary in the certificate. He continued to pay his dues and assessments until the time of his death, and within two years after she rejected his suit he undertook, and did all that he could, and all that he was required in equity to do, to change the donee in the certificate named to that of his son. The rules of the order allowed him to do this, and it was not in the discretion of the order to prevent it. It was a right, under the rules of the order, of which he could not be deprived, upon his complying with the conditions prescribed for such action, and which he performed so far as it was in his power to perform, and for these reasons it would be most unjust and inequitable for a court to disregard such action and such intention of the deceased, before he died, and award his property to the claimant who had forfeited all claim to his bounty and whom he had discarded. \* \* \*

All contracts are presumably made in view of the law governing their construction, and the rules of evidence applicable when the contract is sought to be established and applied. The law never requires impossibilities, and the rules of the order which required the certificate to be surrendered when a change of the beneficiary was made, that it might be indorsed upon the certificate, could only be construed as requiring that to be done when the certificate was in existence. The existence of the right to share in the benefits of the order, and to direct who should receive the fund in case of the death of the member, was a right vested in the member as soon as he became entitled thereto, and the certificate was only evidence of the existence of that right, and where that evidence was lost the right remained,

and its existence could be established by any other competent evidence, and the same is true of the existence of the change, directed by the member of the beneficiary. Mr. Child did all he could do in making the change, and it should have been allowed and done by the order. Equity will consider that done which ought to have been done. For the purpose of determining the rights between these defendants, the proceeding is governed by equitable principles. The fund is held in trust by the order for the person to whom it belongs. And it is true in this, as in every other case, equity follows the law as far as the law goes in securing the rights of parties, and no further; and when the law stops short of securing the object, equity continues the remedy until complete justice is done. In other words equity is the perfection of the law, and is always open to those who have just rights to enforce when the law is inadequate. Any other conclusion would show our system of jurisprudence not only a failure, but a delusion and a snare. Justice alone can be considered in a court of chancery and technicalities never be tolerated, except to attain, and not to destroy it; and the greater equity should always be allowed to prevail. There can be, it seems to me, no doubt in this case, where it lies."

§ 311. **Change of Designation Governed by Same Rules in Respect to Beneficiary as Original Appointment.** — If the charter of the society, or its by-laws, or the statutes of the State, limit the beneficiaries of members to certain classes of persons, so that at first the certificate can only be made payable to one of such classes, an assignment of the certificate cannot be made to one not of the prescribed classes, nor be changed so that one not of the class can become the beneficiary. If this could be done it would be possible to do indirectly what could not be done directly, and in that way the law of the State or society would be made of

no effect.<sup>1</sup> If no restrictions are placed upon the designation of beneficiary the certificate may be changed at the will of the member and as often as he pleases and made payable to any one the member selects, unless, possibly, the law of insurable interest may be applied so as to exclude some.<sup>2</sup>

§ 312. **Rights of Creditors in Benefit.** — It follows that where the beneficiaries are limited to the “family, widows, orphans or other dependents” of the members, or indeed to any class as heirs, legatees or devisees, creditors are excluded and they not only have no claims on the benefit but cannot obtain any. This is doubly the case where benefit societies are organized under statutes restricting the beneficiaries to certain classes. As was said by the Supreme Court of Massachusetts: <sup>3</sup> “If the fund were subject to testamentary bequest, then, upon the decease of the member, it might go into the hands of his executor, or the administrator of his estate and become assets thereof, liable to be swallowed up by the creditors. If there were no creditors, the member by his will could divert it from the three classes named in the statute. In either case, this would defeat the purpose for which the fund was raised and held and would be in direct conflict with the object of the statute for which

<sup>1</sup> *Knights of Honor v. Nairn*, 60 Mich. 44; *American Legion of Honor v. Perry*, 140 Mass. 580; *Elsey v. Odd-fellows' Relief Assn.*, 142 Mass. 224; *Daniels v. Pratt*, 143 Mass. 216; *Ky. Masonic Ins. Co. v. Miller*, 13 Bush, 489; *Weisert v. Muehl*, 81 Ky. 336; *Basye v. Adams*, 81 Ky. 368; *National Mut. Aid Assn. v. Gonser*, 43 Ohio St. 1; *State v. Standard Life Assn.*, 38 Ohio St. 281; *Folmer's Appeal*, 87 Pa. St. 133; *In re Phillips' Insurance*, 23 Ch. D. 235; 52 L. J. Ch. 441; 48 L. T. 81; 31 W. R. 511, C. A. But see *Maneeley v. Knights of Birmingham*, 115 Pa. St. 305.

<sup>2</sup> *Basye v. Adams*, 81 Ky. 368; *Sabin v. Grand Lodge*, 6 N. Y. St. 151; *Massey v. Mut. Rel. Assn.*, 102 N. Y. 523; 34 Hun, 254; *Lamont v. Hotel Men's Mut. B. Assn.*, 30 Fed. Rep. 817; *Lamont v. Iowa Legion of Honor*, 31 Fed. Rep. 177; *Bloomington Mut. Assn. v. Blue*, 120 Ill. 127.

<sup>3</sup> *American Legion of Honor v. Perry*, 140 Mass. 580.

the association was formed, and would set aside the contract entered into between the member and the corporation;”<sup>1</sup> and the same court said in another case:<sup>2</sup> “A person whose only relation to the deceased member is that of a creditor is not a person dependent upon him within the meaning of these statutes; and the promise to pay the plaintiff is void. Such a promise is beyond the powers of the association, and contravenes the intention of the statutes under which the association was organized. The plaintiff cannot, therefore, maintain an action on this promise, either for his own use or for that of any other person.” The general rule may be therefore laid down that a beneficiary fund payable on the death of a member of an association to persons named by him, is not to be treated as a part of his estate, subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries who take directly from such association.<sup>3</sup> A creditor, who has advanced money to pay the assessments of the member, who has had the certificate renewed in his name to secure a loan and payments made by him and has paid subsequent assessments, has the right on the death of the member to be repaid his loan and the assessments paid, the surplus going to the member’s representatives.<sup>4</sup> Where no limitations are placed upon the choice of beneficiary the member

<sup>1</sup> *Daniels v. Pratt*, 143 Mass. 216; *National M. Aid Assn. v. Gonser*, 43 Ohio St. 1.

<sup>2</sup> *Skillings v. Mass. Ben. Assn.*, 5 N. Eng. Rep. 718; 15 N. East. Rep. 566.

<sup>3</sup> *Sup. Council Catholic Mut. Ben. Assn. v. Priest*, 46 Mich. 429; *Sup. Council Catholic M. Ben. Assn. v. Firnane*, 50 Mich. 82; *Knights of Honor v. Nairn*, 60 Mich. 44; *Felix v. Grand Lodge A. O. U. W.*, 31 Kan. 81; *Briggs v. Earl*, 139 Mass. 473; *Swift v. San Francisco Stock & Exchange Board*, 67 Cal. 567; *Durian v. Central Verein*, 7 Daly, 168; *Richmond v. Johnson*, 28 Minn. 447; *Bown v. Catholic Mut. Ben. Assn.*, 33 Hun, 263; *Worley v. Northwestern Mas. Aid Assn.*, 3 McCrary, 53; 10 Fed. Rep. 227; *Schmidt v. Grand Grove*, 8 Mo. App. 601; *Fenn v. Lewis*, 81 Mo. 259; 10 Mo. App. 478.

<sup>4</sup> *Levy v. Taylor*, 66 Tex. 652.

may have an unlimited range and then creditors may take.<sup>1</sup> Life insurance is regarded by the courts in the nature of a provision for a man's family and they are reluctant to divert it from that destination. In most, if not all, of the States, statutes exist exempting policies of insurance upon the life of husband or wife from the demands of creditors, and allowing every person to appropriate annually for the purposes of life insurance for the benefit of wife or children a sum not exceeding \$500. Under a statute of this kind in Iowa, the Supreme Court of that State has held that even where the policy was payable to the assured, "his executors, administrators and assigns," that the wife took the entire fund free from the demands of creditors.<sup>2</sup> In Illinois the Supreme Court has held<sup>3</sup> that it is competent for the parties to contract so as to exclude creditors, and the same doctrine has been laid down in California.<sup>4</sup> In Texas, in a case where the policy was payable to the "heirs or assigns" of the deceased and had not been assigned by him, it was held<sup>5</sup> that the proceeds did not form a part of the estate of the deceased so as to be liable to the debts of the deceased, but went directly to the heirs. It is only upon the clearest proof of fraud, if at all, can the premiums paid by an insolvent upon a life policy for the benefit of his wife and children be recovered by creditors. And even then the recovery is limited to the amount of such premiums, or the excess over the sum allowed by the statute to be expended for life insurance for the debtor's family, where such statutes exist.<sup>6</sup> An assignment by the wife of

<sup>1</sup> *Maneely v. Knights of Birmingham*, 115 Pa. St. 305; *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 127.

<sup>2</sup> *Rhode v. Bank*, 52 Ia. 375.

<sup>3</sup> *People, etc., v. Phelps*, 78 Ill. 147.

<sup>4</sup> *Swift v. San Francisco Stock & Exch. Board*, 67 Cal. 567.

<sup>5</sup> *Mullins v. Thompson*, 51 Tex. 7.

<sup>6</sup> *Pence v. Makepeace*, 65 Ind. 345; *Stone v. Knickerbocker L. Ins. Co.*, 52 Ala. 589; *Stigler v. Stigler*, 77 Va. 173; *Levy v. Taylor*, 66 Tex. 652; *Ætna Nat. B'k v. U. S. Life Ins. Co.*, 24 Fed. Rep. 770; *Central*



a policy of insurance upon her husband's life for her benefit will not be decreed at the suit of creditors, nor its avails be appropriated in advance by operation of law.<sup>1</sup> These statutes do not affect the right of a solvent man to apply as much of his means as he likes to the payment of premiums upon policies of life insurance for his wife's benefit.<sup>2</sup> As between creditors seeking to have a common fund appropriated to the payment of their demands, he who files his bill first is entitled to priority.<sup>3</sup>

*National Bank v. Hume*, 3 Mackey, 360; *Pullis v. Robinson*, 73 Mo. 202; 5 Mo. App. 548; *Conn. M. L. Ins. Co. v. Ryan*, 8 Mo. App. 535; *Mut. L. Ins. Co. v. Sandfelder*, 9 Mo. App. 235; *Cole v. Marple*, 98 Ill. 58; *Filrath v. Schonfield*, 76 Ala. 199; *Thompson v. Cundiff*, 11 Bush, 567.

<sup>1</sup> *Baron v. Brummer*, 100 N. Y. 372.

<sup>2</sup> *Pullis v. Robinson*, 73 Mo. 202.

<sup>3</sup> *Pullis v. Robinson*, *supra*; *George v. Williamson*, 26 Mo. 190; *U. S. Bank v. Burke*, 4 Blackf. 141; *Hills v. Sherwood*, 48 Cal. 393.

## CHAPTER X.

### CONDITIONS WHICH AVOID THE RIGHT: SUICIDE, INTEMPERANCE, ETC.

- § 320. Liability of Insurer under an Insurance Contract, may be conditional.
- 321. Contracts of Benefit Societies and Ordinary Life Insurance Companies Contrasted.
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- 339. Death in Violation of Law.
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§ 320. Liability of Insurer under an Insurance Contract may be Conditional. — In entering into a contract of life insurance it is lawful and usual for the parties to agree upon the terms and qualify the liability with whatever restrictions or conditions they see fit. If these conditions and provisions are not against the policy of the law they will be valid. There may be various qualifications of the liability on the part of the insurance company; such as the

prompt payment of premiums, the observance of certain rules as to residence, habits, etc., and a total exemption from liability if death results from certain causes or occurs under specified circumstances.

§ 321. **Contracts of Benefit Societies and Ordinary Life Insurance Companies Contrasted.** — In ordinary life insurance contracts the policy, or the application, medical examination and other certificates, if such be aptly referred to, in connection with the policy, contain the entire agreement of the parties. Generally speaking the liability of the insurer will not be affected by anything not contained in this contract — the latter is supposed to speak for itself and is to be construed like other contracts; it should be certain and definite so that from the first the assured and insurer may read and know its terms and conditions. With the obligations of benefit societies and their members the case may be somewhat different. It is competent, within certain bounds and by mutual consent, for other conditions or terms to be added to the contract. The member, in becoming such, usually agrees to be bound by laws subsequently enacted, as well as those in force at the time of his joining the society, and thus, in one sense, the contract is uncertain until the liability is determined by the death of the member. We have already discussed the obligation of subsequently enacted laws<sup>1</sup> and have seen that the chief difference between the ordinary contracts of life insurance companies and those usual in benefit societies is that in the former the policy, and documents referred to in it, contain the agreement, while in the latter the certificate, together with the charter and by-laws, are to be looked to for the contract.<sup>2</sup> There is no reason, however, why there should

<sup>1</sup> *Ante*, § 185.

<sup>2</sup> *Holland v. Taylor*, 111 Ind. 121; *Hellenberg v. District No. 1, I. O. O. B.*, 94 N. Y. 580; *Kentucky Mut. Ins. Co. v. Miller*, 13 Bush, 489; *ante*, § 161.

be any distinctions in the application of the law regarding conditions and the terms of the contracts of insurance companies proper and those of mutual benefit societies. In either case the object is to ascertain the intent of the parties and enforce the liability accordingly, unless something in statute or common law forbids.

§ 322. *Scope of this Chapter.* — We have already considered the subjects of warranty and representation and general construction of the contract. Reserving for future discussion the matters of premium, or assessments and dues, and forfeiture for their non-payment, we shall review some of the other conditions generally found in life insurance contracts, the observance of which are necessary, if liability for the loss is to attach. By some of these conditions, usual in life insurance policies, but not so common in the case of the obligations of benefit societies, certain restrictions upon residence, travel, habits and occupation are imposed, and by others the contract is made void if death results from suicide, intemperance or violation of law. It may be possible that the law would imply some of these conditions, but this is disputed. As liability under a policy of fire insurance would be avoided if the assured should himself burn his property, so it is probable that an insurer would not be responsible if the assured should feloniously take the life of the insured, or if the insured knowingly, designedly and understandingly killed himself.<sup>1</sup> Nor need we at this time, either, consider the provisions of the contract as to the proceedings after the loss has occurred, which properly belong to another division of the subject. The inquiry will be, what acts or circumstances will release the insurer who, but for such acts or circumstances, would be liable to the assured.

<sup>1</sup> *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591; *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436.

§ 323. **Condition as to Future Conduct, when Binding.** — It is competent for the assured to warrant that he will or will not do certain things, and the word "guarantee" has been held to be equivalent to warrant.<sup>1</sup> But a stipulation, in order to amount to a warranty, must be in some way incorporated into the policy.<sup>2</sup> It is difficult to distinguish any difference between promissory warranties and promissory representations, unless it be that the former must be strictly complied with and the latter only substantially carried out. If there is any difference it is one of degree. "A promissory representation," says Judge Gray,<sup>3</sup> "may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written, for if it does not exist there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract." In *Prudential Insurance Co. v.*

<sup>1</sup> *Knight v. Mut. Life Ins. Co.*, 14 Phila. 187; affirmed 9 W. N. C. 501.

<sup>2</sup> *Presb. Ass. Fund v. Allen*, 100 Ind. 598; *Cushman v. U. S. Life Ins. Co.*, 68 N. Y. 404; *Jeffries v. Union Mut. L. Ins. Co.*, 1 McGray, 114; 1 Fed. Rep. 450; 22 Wall. 47; *ante*, § 208.

<sup>3</sup> *Kimball v. Atlas F. Ins. Co.*, 9 Allen, 548.

*Ætna Life Ins. Co.*,<sup>1</sup> it was said: "The insurer is at liberty to compel an observance of promises in regard to future conduct, by incorporating them into the written contract, if it regards a performance as important, but the promise, unless embodied in the contract is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends, must appear in the agreement."<sup>2</sup> There is a difference of opinion as to what language will constitute a promissory warranty. In one case<sup>3</sup> the Supreme Court of Pennsylvania held that by "declaring" that he would not do certain things the insured did not "warrant" that he would not. The United States Circuit Court, upon similar facts, held the reverse.<sup>4</sup> In a case decided by the Supreme Court of California,<sup>5</sup> the facts were these: The member of a temperance order agreed in his application "that a compliance with all the laws, regulations and requirements which now or hereafter may be enacted by our said order is the express condition upon which I am to be entitled to participate in the mutual benefit life system," and the certificate contained a clause that it was issued upon the express condition that the member "shall in every particular, while a member of our said order, comply with all the laws, rules and requirements thereof." After becoming a member the assured began to drink intoxicating liquors and his death was hastened by such use of liquor. At the time of his death all his dues and assessments were paid up, and afterwards the beneficiary named

<sup>1</sup> U. S. Cir. Ct. Conn., 52 Conn. 576; 23 Blatchf. 223; 23 Fed. Rep. 438.

<sup>2</sup> Citing *Alston v. Mechanics' Ins. Co.*, 4 Hill, 329; *Mayor, etc., v. Brooklyn Ins. Co.*, 4 Keyes, 465; *Bryant v. Ocean Ins. Co.*, 22 Pick. 200; *Ins. Co. v. Mowry*, 96 U. S. 544.

<sup>3</sup> *Knecht v. Mutual Life Ins. Co.*, 90 Pa. St. 118.

<sup>4</sup> *Schultz v. Mut. Life Ins. Co.*, 6 Fed. Rep. 672.

<sup>5</sup> *Hogins v. Sup. Council. Champions of the Red Cross*, 18 Pac. Rep. 125.

in the certificate brought suit against the order for the benefit. The defense was the violation of the condition as to the use of liquor. The remaining facts are stated by the court in its opinion as follows: "The controlling and distinguishing feature of this order is its requirement of daily abstinence from the use of liquor as a beverage by its members. It is the fundamental principle in every degree. In order to become a member of the order, or entitled to a beneficiary certificate, the applicant was required to take all the degrees, and to pledge himself upon taking each one, that so long as he was a member of the order he would wholly abstain from the use of all alcoholic liquors as a beverage. Violations of this pledge were punished by suspension. The system of insurance is clearly intended to be confined exclusively to temperance people. The applicant Hogins so understood it. In his application he expressly agreed that he should not be entitled to the benefits of the system unless he complied with all the laws, regulations and requirements of the order. The clause quoted from the certificate does not, perhaps, literally express the meaning intended, but it is quite clear what was meant and intended by the parties. It does not say that payment is contingent upon the express condition, but such was clearly the intent. Appellant claims that the condition is for the issuance merely, but the conditions are in their nature matters to occur in the future. 'That said Daniel Hogins shall in every particular, while a member of our said order, comply with all the laws, rules and requirements thereof,' shows beyond controversy that his conduct after the issuance of the certificate was to be the condition of payment. His application shows clearly that such was his intention and contract, and we think that the application and the certificate may be read together for the purpose of showing that the clause in the certificate is an express condition precedent to the payment of the insurance. \* \* \* We

do not think that suspension or expulsion was necessary by the order to forfeit the policy.”<sup>1</sup>

§ 324. **Restrictions on Travel or Residence.**—It is usual in life insurance policies for restrictions to be imposed upon the insured in regard to travel or residence beyond certain limits. In these cases, while the condition must be kept, it is competent for the insurer expressly, as by a permit, or impliedly, as by receiving a premium with knowledge of the violation<sup>2</sup> to waive the forfeiture. In the case of implied waiver it is immaterial whether the knowledge be actual or constructive,<sup>3</sup> but, if the knowledge be received through an agent who, under the contract, has no right to waive forfeitures there will be no constructive knowledge of the insurer<sup>4</sup> unless the insured be misled to his prejudice. If a permit be granted it will be construed most strongly against the company.<sup>5</sup> If the language used is clear and unambiguous it must be strictly followed, although the deviation be to the advantage of the insurer,<sup>6</sup> and the waiver is only for the time named and after its expiration the conditions of the policy remain in force.<sup>7</sup> The indorsement of a permit to enjoy privileges which the insurer had under the original contract will not affect or restrict such rights;<sup>8</sup> but if such indorsement be made at the time the policy is issued it is to be deemed

<sup>1</sup> See *Sup. Counc. Royal Templars of Temperance v. Curd*, 111 Ill. 284.

<sup>2</sup> *Bevin v. Conn. Mut. L. Ins. Co.*, 23 Conn. 244.

<sup>3</sup> *Wing v. Harvey*, 5 De G. M. & G. 265; 27 E. L. & Eq. 140; *Garber v. Globe, etc., Ins. Co.*, 5 Big. L. & A. Ins. Cas., 221; *Girdlestone v. N. B. Mar. Ins. Co.*, 11 L. R. Eq. Cas. 197.

<sup>4</sup> *Lorie v. Conn. M. L. Ins. Co.*, 5 Big. Life & Acc. Ins. Cas. 233.

<sup>5</sup> *Taylor v. Aetna Ins. Co.*, 13 Gray, 434; *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 476; *Pohalaski v. Mut. L. Ins. Co.*, 56 N. Y. 640; 45 How. Pr. 504.

<sup>6</sup> *Hathaway v. Trenton Mut. L. Ins. Co.*, 11 Cush. 448; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray 249; *Raynsford v. Royal Ins. Co.*, 52 N. Y. 626.

<sup>7</sup> *Ayer v. N. E. Mut. L. Ins. Co.*, 109 Mass. 430.

<sup>8</sup> *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249.



part of the contract.<sup>1</sup> A permit, however, is a separate and independent agreement.<sup>2</sup> In construing policies the term, "settled limits" of the United States, means the established boundaries of the Union.<sup>3</sup> Whether when, under a permit, the insured has gone into a region forbidden by the policy and is there taken sick so that he cannot return within the specified time, the policy is forfeited under the condition, is doubtful. In one case<sup>4</sup> the insured was restricted from being in certain territory after a specified date. About a month before the latter date he, being in such territory, was taken sick and, being too ill to travel, remained where he was until after the limit of time expired, when he died. The court held that the sickness was an act of God which saved the condition. In a later case in the same State,<sup>5</sup> it was held that, if a person, already in feeble health, goes beyond the restricted limits and remains there until he is too feeble to return, the impossibility of return cannot be alleged as an excuse for violating the condition for the insured took the chances.<sup>6</sup> The court says:<sup>7</sup> "The policy contained a provision that it should be void, null and of no effect; in case Starr, whose life was insured, should, between the first day of July and the first day of November in any year, visit any part of the United States lying south of the southern boundaries of Virginia and Kentucky, without the written consent of the company. In November, 1869, he went to Louisiana and remained there until he

<sup>1</sup> *Raynsford v. Royal Ins. Co.*, 52 N. Y. 526; 1 J. & S. 453.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Casler v. Conn. Mut. L. Ins. Co.*, 22 N. Y. 427. But in this case part of the court dissented. Every year, however, this question is assuming less importance, if it even now has not become meaningless.

<sup>4</sup> *Baldwin v. New York Life Ins. Co.*, 3 Bosw. 530.

<sup>5</sup> *Evans v. United States Life Ins. Co.*, 64 N. Y. 304; affirming 3 Hun, 587.

<sup>6</sup> *Wheeler v. Conn. Mut. L. Ins. Co.* 83 N. Y. 543, where both of the preceding cases are referred to.

<sup>7</sup> *Evans v. United States Life Ins. Co.*, *supra*.

died, on the 18th day of March, 1872. The defendant alleged this as a breach of the policy and refused payment upon this ground. He had the written permit of the defendant to go to New Orleans and remain there until the first day of July, 1870. The claim on behalf of the plaintiff is that he (insured) became so sick and feeble that he could not return, and hence that his return was rendered impossible by the act of God, and that therefore his absence was excused and there was no breach of the policy. Even if this claim were otherwise valid the facts do not sustain it. The only proof upon the subject is that he met with an accident before going south; that his health was very poor in the summer of 1870, and 'he could only ride out to the plantation in which he was interested in a buggy, and ride back, not getting out of it, and was never any better.' No witness testified that he was too unwell to return north, or that he made any effort to return, and his condition before July 1st was not described. To bring the case within the supposed rule there should have been proof that for some time before July first he was unable to travel by any of the usual modes; not that it was merely inconvenient for him to travel, but impossible. He was bound to return if he could travel by short stages, or by incurring unusual expense to secure comfort, safety and convenience. But another answer to this claim is that he took the chances of being unable to return. He went south for business purposes, knowing that the policy would be avoided if he did not return by the first day of July. He had the right to go and remain there until July first without the permit of the company. He obtained that that he might, without violating another condition in the policy, go and return upon the ocean if he desired to. He was feeble when he went and he could not go so far south that he could not return, and after remaining there until he was too feeble to return, enable the holder of the policy to claim that his return was rendered

impossible by the act of God, and that thus the breach of the condition was excused."

§ 325. **Change of Occupation to one more Hazardous or one Prohibited.** — A condition that the insured shall not change his occupation to one more hazardous is not violated if the insured casually engage in a different business. As for example, if a teacher temporarily work upon a building he is erecting for himself and is killed while so doing.<sup>1</sup> Or if a slave, who was a laborer in a tobacco warehouse, be killed while being removed to a plantation north of New Orleans, the policy forbidding a removal to more southern localities.<sup>2</sup> If the insured engage in any occupation prohibited by the terms of the policy it will be void, if so provided in the contract.<sup>3</sup> A prohibition against entering the military service is not unusual. It has been held that this does not apply where a person occupied a mere clerical position in the office of the adjutant-general,<sup>4</sup> but does if the insured connects himself in any way with the belligerent force,<sup>5</sup> and it is immaterial whether the service was voluntary or involuntary.<sup>6</sup> It has been held that whether being a chaplain in the army is being in the "military service" within the meaning of these words in a policy of life insurance is a question for the jury.<sup>7</sup> In one reported case<sup>8</sup> the contract provided that the insurance should be avoided if death resulted from any of the casualties of war or rebellion, or from belligerent forces in any place where the insured might be. The insured was killed just after the

<sup>1</sup> *Stone v. United States Casualty Co.*, 34 N. J. L. 371.

<sup>2</sup> *Summers v. U. S. Annuity, etc., Co.*, 13 La. Ann. 504.

<sup>3</sup> *Northwestern Mut. Life Ins. Co. v. Amerman*, 119 Ill. 329, 10 N. East. Rep. 225; 7 West. Rep. 712.

<sup>4</sup> *New York Life Ins. Co. v. Hendren*, 24 Gratt. 540.

<sup>5</sup> *Mitchell v. Mut. L. Ins. Co.*, cited Bliss L. Ins. 699.

<sup>6</sup> *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119.

<sup>7</sup> *Mut. Ben. L. Ins. Co. v. Wise*, 34 Md. 582.

<sup>8</sup> *Welts v. Conn. Mut. L. Ins. Co.*, 46 Barb. 412.

civil war by a roving guerrilla band. The court held that the proviso did not attach for it was the same as if the insured had been murdered by a robber, the band in question being mere robbers.

§ 326. **Intemperance.** — There may be in the policy an agreement as to the habits of the insured. The usual conditions are that the policy shall be void if the insured becomes “so far intemperate as to impair his health or induce *delirium tremens*.” In a case in Illinois<sup>1</sup> the beneficiary certificate given to a member of an order, witnessed that he was entitled to certain rights and privileges of the order, and the same was issued upon the express condition that he should, while a member of the order, faithfully maintain his pledge of total abstinence, and comply with all the laws, rules, regulations and requirements of the order, otherwise it to be of no effect, and if the member should die in good standing the beneficiary should be entitled to certain benefits. The Supreme Court held that as the requirements in the condition were used conjunctively, a compliance with all of them was necessary to a recovery, and that a violation of the pledge of total abstinence, alone, would bar a recovery by the beneficiary.<sup>2</sup> Where the application contained a recital that if the applicant, at that time represented to be temperate, “become as to habits far different from the condition in which he is represented to be, so as to increase the risk on the life insured, the policy shall become null and void,” and the policy expressed “that if any of the declarations and statements made in the application shall be found in any respect untrue,” that it shall be void; it was held<sup>3</sup> that this was an

<sup>1</sup> Royal Templars of Temperance v. Curd, 111 Ill. 284.

<sup>2</sup> See also Hogins v. Sup. Counc. Champions of Red Cross (Cal.), 18 Pac. Rep. 125.

<sup>3</sup> Boyle v. Phoenix Mut. L. Ins. Co., Ramsay's App. Cases (Lower Canada), 379.

express warranty that the insured would not alter his habits, and it having been proved that he had become so far intemperate as to increase the risk, the policy was avoided.<sup>1</sup> In a case in the United States Circuit Court<sup>2</sup> the court instructed the jury to the effect that the impairment of health, contemplated by the condition that the policy shall be void if the insured becomes "so far intemperate as to impair his health or induce delirium tremens," is not necessarily permanent or irremediable, nor is it the temporary indisposition or disturbance usually resulting from a drunken debauch, but it is the development of disease, or the impairment of constitutional vigor, by the use of intoxicating beverages in such a degree and for such a time as is ordinarily understood to constitute intemperance. "A single excessive indulgence in alcoholic liquors is not intemperate, but there must be such frequency in their use, continued for a longer or a shorter period, as indicates an injurious addiction to such indulgence." But, upon appeal to the Supreme Court of the United States,<sup>3</sup> the case was reversed, the court saying: "The effect of these and other instructions was that the policy should be void if the insured became so far intemperate as to impair his health, was not broken unless intemperance became the habit or rule of his life after the policy was issued. The jury may have believed — and there was some, we do not say conclusive, evidence to justify them in so believing — that the efficiently controlling cause of the death of the insured was an excessive and continuous use of strong drinks for several days and nights immediately preceding his death; yet they were not at liberty, under the instructions, to find that he became so far intemperate as to impair his health, unless it further appeared that his intemperance in the use of alcoholic stim-

<sup>1</sup> See *Knecht v. Mut. L. Ins. Co.*, 90 Pa. St. 118; *Schultz v. Mut. L. Ins. Co.*, 6 Fed. Rep. 672.

<sup>2</sup> *Davey v. Etna L. Ins. Co.*, 20 Fed. Rep. 482.

<sup>3</sup> *Etna L. Ins. Co. v. Davey*, 123 U. S. 739; 8 Sup. Ct. Rep. 333.

ulants covered such a period of time as to constitute the habit of his life. This construction of the contract is, in our judgment, erroneous. If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words, 'so far intemperate as to impair his health,' although he may not have had delirium tremens, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Whether death was so caused is a matter to be determined by the jury under all the evidence."<sup>1</sup> Under a somewhat similar clause the Supreme Court of Pennsylvania held<sup>2</sup> as follows: "The whole defense arises under this clause in the policy: 'It is further agreed and understood, that if he shall become so far intemperate, as to seriously or permanently impair his health or induce delirium tremens, then this company shall not be liable.' Thus, no degree of intemperance was sufficient to defeat a recovery unless it had the effect 'to seriously or permanently impair his health or induce delirium tremens.' Any less effect was insufficient. No offer to prove that Rohkopp's intemperance produced any such effect was rejected. The rejected offer covered by the first assignment [of errors] clearly shows that the company did not consider habitual intemperance any ground for refusing a risk. It was to prove that Rohkopp was an habitual drunkard for many years prior to and at the time the insurance was taken; that he had created an appetite which had become fixed upon him; but that it had not seriously impaired his health at that time. The offer did not propose to show that he thereafter

<sup>1</sup> See *Northwestern Ins. Co. v. Muskegon Bank*, 122 U. S. 502; 7 Sup. Ct. Rep. 1221.

<sup>2</sup> *Odd-fellows' Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59.

became so intemperate as to either 'seriously or permanently impair his health.' It was to show 'by experts that the amount he had drank before and the amount he had drank afterwards, was sufficient to seriously impair a man's health.' The capacity of persons to drink liquor is so unequal, and the effect is so different on different individuals, it by no means follows that a quantity sufficient to affect some other man's health had the same effect on the health of Rohkopp. The question in issue was, did his intemperance so affect him? The court opened the door wide and permitted the plaintiff in error to give all the evidence offered of Rohkopp's intemperate habits and of the effect on him. That he was habitually intemperate was not denied or controverted. It was clearly proved. The contention was, whether its effect was such as to bring him within the clause of the policy which would prevent a recovery. Possessing a constitution and health, which habitual intemperance for so many years had been unable to seriously injure, showed a capacity to withstand its action, that justly confined the evidence to the effect the liquor had on him, and not what effect it might have on some other person." A specific stipulation in a separate clause of a policy of life insurance, that if the assured shall become intemperate to a certain degree the company may cancel the policy, and thus absolve itself from liability, will control a general stipulation that such a degree of intemperance shall work an absolute forfeiture.<sup>1</sup> Where the assured covenanted not to "practice any pernicious habit that obviously tends to shorten life," it was held that an excessive use of alcoholic liquors was such a pernicious habit as avoided the policy.<sup>2</sup>

**327. Death from Specified Causes may avoid the Policy.** — It is usual in this country for a condition to be inserted in life insurance policies that the insurer shall not be

<sup>1</sup> Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212.

<sup>2</sup> Schultz v. Mut. L. Ins. Co. of New York, 6 Fed. Rep. 672.

liable if the death of the assured be caused by intemperance, suicide or violation of law, or if he die at the hands of justice. It was formerly a common provision that the policy should be void if the insured died "on the high seas." Interesting questions have arisen upon the construction to be given this condition and what facts are necessary to bring the case within the proviso so as to relieve the insurer. These questions will now be examined, for they have been discussed by the courts with considerable logic and research.

§ 328. **Intoxicants.** — Where the policy provided that it should be void if the "death be caused by the use of intoxicating drink or opium," it was said by the Supreme Court of Maryland<sup>1</sup> that this means "that the things prohibited should be the *direct* cause of the death in order to avoid the policy." The fair deduction from a decision of the Supreme Court of the United States<sup>2</sup> is that, under a similar condition, the use of intoxicating drink or opium must be the *substantial* cause of death. In an English case the policy provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor, or exposing himself to any unnecessary danger or peril. The assured, being more or less under the influence of liquor, accosted a woman in the street, and, persisting in so doing in the face of remonstrances, was knocked down by a man in whose company she was, and received injuries from which he died. It was held<sup>3</sup> that it was not necessary that the assured should be under the influence of intoxicating liquor at the time of his death, as well as at the time when the injury was sustained, but that it was sufficient to show that he was under such influence when he met with the injury from which death re-

<sup>1</sup> Mutual Life Ins. Co. v. Stibbe, 46 Md. 302.

<sup>2</sup> Ætna L. Ins. Co. v. Davey, 123 U. S. 739; 8 Sup. Ct. Rep. 331.

<sup>3</sup> Mair v. Railway Passengers' Assn. Co., 37 L. T. 356.



sulted afterwards. It was also said that the words, under the influence of intoxicating liquor, means such influence as to disturb the quiet equable exercise or a man's intellectual faculties. Also that the latter part of the proviso, with regard to willful exposure to peril, should be limited to dangers *ejusdem generis* with those recapitulated in the earlier part of the clause, and did not extend to the exceptional circumstances under which the insured met his death.<sup>1</sup> In a case decided by the Supreme Court of Iowa,<sup>2</sup> the policy provided that it should be void if the insured should die "by reason of intemperance from the use of intoxicating liquors." The deceased was given to periodical debauches. During one of these, and while suffering from delirium tremens, the insured escaped from those who had him in charge, ran into the open air and through the streets in inclement weather, without clothing, contracting cold from such exposure. This cold resulted in congestion of the lungs and brain, from which he died. It was held that these facts supported the conclusion that the death was caused by intemperance. The same court in a previous consideration of the same case,<sup>3</sup> approved an instruction of the lower court that the jury, in order to sustain the defense that the death was caused by liquor, must find more than that the death was only contributed to by the intemperate use of drink, and that the sole or paramount cause of the death was the intemperate use of intoxicating liquors. The court said: "The defendant claims that 'if intemperance shortens life it is a cause of death within the meaning of the policy,' and that the policy is thereby avoided. It rarely, if ever, happens, that the intemperate use of intoxicating drinks is indulged in for a considerable period without, to some extent, shortening life. The consequences of the construc-

<sup>1</sup> See *Shader v. Railway Passengers' Assn. Co.*, 3 Hun, 424; 5 N. Y. St. C. 643; *Macrobbe v. Accident Ins. Co.*, 13 Scot. L. Rep. 391.

<sup>2</sup> *Miller v. Mut. Benefit Ins. Co.*, 34 Ia. 222.

<sup>3</sup> *Miller v. Mut. Benefit Ins. Co.*, 31 Ia. 235.

tion contended for by the defendant would therefore be, that an insurance company which had assured the life of one known to be intemperate, and which had charged a higher rate of insurance in consequence of such fact, could exonerate itself from liability upon the policy by showing that the life of the assured had been shortened by intemperance. A sound principle does not lead to consequences so unjust and unreasonable. A proximate cause of an effect is that which immediately precedes and produces it, as distinguished from the remote, mediate or predisposing cause. When several causes contribute to death as a result, it may be extremely difficult to determine which was the remote and which the immediate cause, yet this difficulty does not change the fact that the death is to be attributed to the proximate and not the mediate cause. Nor is the difficulty in questions of this kind any greater than that which arises in questions of negligence, contributory negligence, and many others which are constantly the subjects of judicial investigation.”<sup>1</sup>

§ 328a. **Suicide.** — Some of the most interesting discussions to be found in the reports are those of the construction to be given a clause in a life insurance policy absolving the company from all liability if the insured die “by his own hands” or “by suicide.” The policies of the various companies greatly differ in their language in regard to the voluntary death of the insured, as they have endeavored to except from their undertaking suicidal deaths. The subject is of greater importance to life insurance companies than to benefit societies, for very few of the latter attempt to distinguish between deaths that are suicidal and those resulting from other causes. It is unnecessary to even attempt any argumentative or philosophical discussion of the

<sup>1</sup> *Holteroff v. Mut. Ben. L. Ins. Co.* (Cin. Superior Ct.), 4 Big. L. & A. Ins. Cas. 395; *Ranney v. Mut. Ben. L. Ins. Co.*, cited *May on Ins.*, § 302, tried in U. S. Cir. Ct. Dist. of Mass.

subject, but to briefly review some of the leading cases upon the subject so that a few general rules may be inferred.

§ 329. **Where Sane Person Takes His Life by Accident.** — In the first place, it seems settled that if a sane person accidentally, or by mistake, does any act which causes his death, it is not within the exception of a proviso that the policy shall be void if the insured die by his own hands “sane or insane,” “voluntarily or otherwise.” A leading case on this subject is *Penfold v. Universal L. Ins. Co.*<sup>1</sup> In this case the Court of Appeals of New York said: “The ordinary clause in life policies, that the insurer shall not be liable in case the person whose life is insured shall die by his own hand or act, has been repeatedly the subject of judicial construction and it is now well settled that it is not to be construed as comprehending every possible case in which life is taken by the party’s acts and that an unintentional or accidental taking of one’s own life is not within the meaning of the clause. The taking of one’s own life, not accidentally, but under the influence of insanity, has also been determined not to be a violation of the condition, but there has been difference of opinion as to the degree or character of the insanity which exempts from the operation of the condition; some authorities holding that it must be such a degree of insanity as to deprive the party of knowledge of the nature and probable consequences of the act which produced the death, others adopting the rule of the criminal law, that he must have been so far deprived of his reason as to be unconscious of the moral obliquity of the act, and later cases holding that, although possessed of sufficient reason to comprehend the consequences of the act and the moral wrong which it involved, yet if the patient was driven to it by an insane impulse, produced by disease, which disabled him from controlling his own actions, and

<sup>1</sup> 85 N. Y. 317; 39 Am. Rep. 660.

the death resulted from that cause, the act was not voluntary and the condition was not violated.<sup>1</sup> The question in all cases of this character is the proper interpretation of a contract, and the point of inquiry is, what obligations the parties must, from the language used, with relation to the subject-matter and the circumstances, be reasonably supposed to have intended to assume. The clause against suicide is clearly intended to protect the insurance company against the fraudulent act of the insured, whereby he may, even at the sacrifice of his own life, secure a benefit to those whom he may desire to favor, at the expense of the insurance company. But, as has already been said, it has been held from the earliest day that a suicide committed in consequence of insanity was not within the meaning of the condition, although within its literal terms. The decisions establishing this doctrine were placed upon the ground that the death, though apparently caused by the act of the party, was not so caused in contemplation of law, because his mind did not concur in the act, his mental organs having been so diseased as to cease to control his actions, or to guide them in accordance with reason. At a later day in the history of life insurance some companies, for the purpose of avoiding the difficulties involved in the inquiry as to the condition of the mind of the person committing self-destruction, stipulated for exemption from liability in all cases of suicide, whether 'sane or insane.' Others adopted the words 'voluntary or involuntary,' others, as in the present case, 'voluntary or otherwise.' It would not be a fair interpretation of this clause, in either of the forms mentioned, to hold it to cover the case of a purely accidental death from poison occurring to a sane person, through mistake or ignorance, though his own hand might have been the innocent instrument by which the

<sup>1</sup> *Van Zandt v. Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215; *Newton v. Ins. Co.*, 76 N. Y. 426; 32 Am. Rep. 335.

deadly potion was conveyed to his lips. Such an accident cannot be presumed to have entered into the minds of the contracting parties, or to have been intended to be stipulated against. The insurance was intended to cover the risk of premature death, which might result from any of the casualties to which human life is subject — self-destruction being excepted. A purely accidental act, committed by a sane person, with no idea of injuring himself, cannot be regarded as an act of self-destruction within the meaning of such a contract. Suicide is the act stipulated against. The words ‘voluntary or otherwise’ preclude the parties claiming under the policy, if the act was one of suicide, from setting up the condition of the mind of the party committing it, and contending that it was an involuntary act of suicide. But still it must be a suicide, and who would contend that the taking of poison by mistake, or any other act which a sane person might innocently commit, though it should result in death, was what is ordinarily understood as self-destruction or suicide? It is unreasonable to suppose that one effecting an insurance upon his life, in stipulating against death by his own hand or act, could intend to embrace such a casualty or that the insurance company could fairly expect him to so understand.” This view is substantially supported by the authorities in other States<sup>1</sup> and it does not alter the rule that the deceased was negligent or careless at the time the accident occurred.<sup>2</sup> This exception may even extend to cases where the insured is responsible for a condition in which he can have no intelligent idea of what he does. For example, where the insured drank to intoxication, and while in this

<sup>1</sup> *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212; *Lawrence v. Mut. L. Ins. Co.*, 5 Bradw. 280; *Keels v. Mut. Reserve F. L. Ins. Assn.*, 29 Fed. Rep. 198; *Edwards v. Travelers L. Ins. Co.*, 20 Fed. Rep. 661; 22 Blatchf. 225; *Suppiger v. Covenant Mut. Ben. Assn.*, 20 Bradw. 595.

<sup>2</sup> *Pierce v. Travelers' Life Ins. Co.*, 34 Wis. 389; *Lawrence v. Mut. L. Ins. Co.*, *supra*.

condition, by accident or mistake took an overdose of laudanum and died therefrom, it was held<sup>1</sup> that this is not dying by his own hand in the sense of these words as used in the policy, even though the mistake or accident be in some sense occasioned by the drunkenness; but if he took the laudanum with intent to destroy his life, though it be but the intent of a drunken man, this is dying by his own hand. "Very clearly," says the court, "to our minds, a death by accident does not come within the description of dying by one's own hand. There must be an *intent* to commit suicide. Even though it be but the *intent* of a drunken man, however, it is none the less an intent."

§ 330. **Deliberate and Intentional Suicide by Sane Person.** — If a sane man deliberately takes his own life, it has been contended that it is such a fraud upon the insurers as to preclude recovery on the contract. In practice, however, such cases are unlikely to occur and it has held that unless it is so stipulated in the policy suicide is no defense.<sup>2</sup> In one case the circumstances indicated deliberate suicide, but this point was not discussed.<sup>3</sup> In *Fowler v. Mutual L. Ins. Co.*,<sup>4</sup> the facts showed such a deliberate suicide that the court withdrew the case from the jury and held that, under the stipulation that the policy should be void if the insured died "by his own hand," the plaintiff could not recover. Where a woman voluntarily caused an abortion to be performed on her, from the effects of which she died, it was held that, on the ground of public policy, a policy of insurance on her life was avoided.<sup>5</sup>

<sup>1</sup> *Equitable Life Assn. Soc. v. Paterson*, 41 Ga. 338.

<sup>2</sup> *Horn v. Anglo-Australian, etc., Ass. Co.*, 30 L. J. Ch. 511; 7 Jur. (N. S.) 673; 9 W. R. 359; 4 L. T. (N. S.) 142; *post*, § 336.

<sup>3</sup> *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

<sup>4</sup> 4 Lans. 202.

<sup>5</sup> *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550. But this case more properly belongs under the class of deaths caused by violation of law.

§ 331. **Suicide and Death “by his own Hand”** *Synonymous*. — Practically all the cases agree in holding, in the language of the Supreme Court of Massachusetts<sup>1</sup> that: “There is no substantial difference of signification between the phrases ‘shall die by his own hand,’ ‘shall commit suicide’ and ‘shall die by suicide.’” The rule of construction, though not always expressly recognized by the cases, is that this condition, being in the nature of a penalty or forfeiture, must be strictly construed. This was the view of the Supreme Court of Michigan,<sup>2</sup> and commends itself as one eminently in accordance with justice and reason.

§ 332. **English Rule as to Suicide**. — In England a rule in relation to suicide was laid down in 1842 in *Borradaile v. Hunter*,<sup>3</sup> and has ever since been adhered to. In this case the words of the condition were that the policy should be void if the assured “should die by his own hands.” He threw himself from Vauxhall bridge into the Thames and was drowned. The jury found that he “voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but that at the time of committing the act he was not capable of judging between right and wrong.” It was held that the policy was void, the rule being laid down in effect that the moral condition of the mind was immaterial and if, when the act is done, the insured knew that his life would be thereby destroyed and intended it to be so, the policy is vitiated under the condition, although the insured was insane at the time.<sup>4</sup> It is usual now in that country to

<sup>1</sup> *Cooper v. Mass. Ins. Co.*, 102 Mass. 227.

<sup>2</sup> *John Hancock Mut. L. Ins. Co. v. Moore*, 34 Mich. 41.

<sup>3</sup> 5 Man. & G. 639; 5 Scott. N. R. 418; 12 L. J. C. P. 225; 7 Jur. 443; 2 Big. Life & Acc. Ins. Cas. 280.

<sup>4</sup> *Dormay v. Borradaile*, 5 M. G. & S. 380; *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 599; 4 Jur. (N. S.) 841; 27 L. J. Ch. 817; *White v. British Empire, etc., Co.*, L. R. 7 Eq. 394; 19 L. T. (N. S.) 308; 17 W. R. 26; 38 L. J. Ch. 53. In *Schwabe v. Clift*, 2 Car. & Kir. 134; 3 Man. G. &

incorporate in the policy an exception to the effect that death of the insured by suicide shall not avoid the policy if it has passed to a *bona fide* assignee. This exception has been held not to be against public policy, but it applies only to persons acquiring by assignment from the assured.<sup>1</sup> It does not apply in favor of an assignee by operation of law, as an assignee in bankruptcy.<sup>2</sup>

§ 333. **Conflict of Cases in America.** — In America the cases are in conflict and cannot be reconciled. They seem to divide themselves into two classes; the one class holds that the suicide clause does not apply where the insured is insane at the time of the act, but only includes cases of felonious suicide. The other class of cases takes the words in their plain and every-day significance and holds that the insurer is released if the insured intentionally takes his own life. The courts, in passing upon the question, have exhaustively treated it and considered the subject in all its features. It would be interesting to review the various decisions and trace step by step the progress of the discussion, but it is hardly necessary to do so. The subject has been carefully and fully treated by the leading writers on life insurance and annotators and to them the reader is referred for further light.<sup>3</sup>

S. 436; 17 L. J. C. P. 2, a distinction was attempted to be made between the words, "commit suicide" and "die by his own hands," but this was reversed by the Exchequer Chamber in *Clift v. Schwabe*, 3 C. B. 437; 17 L. J. C. P. 2; 2 C. & K. 134 Ex. Ch.; 2 Big. L. & Acc. Ins. Cas. 312.

<sup>1</sup> *Moore v. Wolsey*, 4 El. & Bl. 243; 24 L. J. Q. B. 40; 1 Jur. (N. S.) 468; 28 Eng. L. & Eq. 248; *Dufaur v. Professional Life Ass. Co.*, *supra*: *Jones v. Consolidation Ins. Ass. Co.*, 26 Beav. 256; 5 Jur. (N. S.) 214; 28 L. J. Ch. 66; 3 Big. Life & Acc. Ins. Cas. 192; *White v. British Empire, etc., Co.*, *supra*.

<sup>2</sup> *Jackson v. Forster*, 5 Jur. (N. S.) 547; 1 El. & Bl. 463; 2 Big. Life & Acc. Ins. Cas. 567.

<sup>3</sup> Bliss on Life Insurance, § 230, *et seq.*; May on Ins., § 307, *et seq.* Appended to *Breasted v. Farmers' L. & T. Co.*, 59 Am. Dec. 487, is a most valuable note where the leading authorities are collated and digested.



§ 334. **The Most Approved Rule.** — We may take as the leading case upon this subject in the United States that of *Mutual Life Ins. Co. v. Terry*,<sup>1</sup> decided by the Supreme Court of the United States and approving what had been known as the New York doctrine. In this case the policy was to be void if the insured should “die by his own hand.” Justice Hunt, after a full review of the cases, laid down the general rule thus: “If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract and the insurer is liable.” This rule has been approved in subsequent decisions of the same court.<sup>2</sup> In Michigan the Supreme Court has stated the rule, in somewhat different language,<sup>3</sup> but in effect the same, as follows: “The forfeiture in this case was to arise if the insured died by his own hand. Some stress is laid on the term ‘suicide,’ as if it means a wrongful act or self-murder. It has no such restricted meaning. It means self-killing, just as ‘homicide’ means killing any one else. But there may be excusable homicide as well as felonious, and suicide was only cognizable at law

<sup>1</sup> 15 Wall, 580; 7 Alb. L. J. 310; 3 Big. Life & Acc. Ins. Cas. 819; 2 Ins. L. J. 540, affirming 1 Dill. 403.

<sup>2</sup> *Insurance Co. v. Rodel*, 95 U. S. 232; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121, Justice Gray delivering the opinion of the court.

<sup>3</sup> *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41.

when the person was *felo de se*, or guilty of a felonious act. If *non compos mentis*, the actor in homicide or suicide commits no crime. In one sense, the man dies by his own hands who kills himself, whether sound or frenzied. But the condition in this policy cannot be construed to cause a forfeiture for acts involving no evil will. The clause punishing the insured for self-slaughter is a penal clause in the strictest sense of the term, and embraces several other acts in the same penalty, all of which involve voluntary wrong-doing. They are death by duelling, or by the hands of justice, or in the violation of the laws, or impairing health by vice or intemperance. When an act which is to cause forfeiture is classed among such wrongful conduct it is fairly to be inferred that it is regarded as *ejusdem generis*, and depending on the same reasons. A construction which punishes a person who is not in fault is not to be favored, if it can be allowed at all. The very object of life insurance is to provide for death by disease or in the ordinary course of nature. Death by his own hands, in the case of one *non compos*, is as much the result of disease as death by fever or consumption. The act of an insane man is morally no more his act than if it were mechanical." The rule as above laid down is sustained by a preponderance of authority and must now be regarded as the settled rule in most of the States in the Union.<sup>1</sup>

<sup>1</sup> *Breasted v. Farmers' Loan & Trust Co.*, 8 N. Y. (4 Seld.) 299; 4 Hill, 73; 59 Am. Dec. 482, is the earliest reported case and held that a policy conditioned to be void if the insured died "by his own hand" was not avoided if at the time of the act the insured was insane. This case was modified, if not overruled, by *Van Zandt v. Mut. Ben. Life Ins. Co.*, 55 N. Y. 169; 14 Am. Rep. 215; 4 Big. Life & Acc. Ins. Cas. 313, where it was held that, under a condition as above, the only exceptions to the condition is where the act is accidental or involuntary; that to take a case out of the proviso the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist; it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act. In

§ 335. **The Rule in Massachusetts.** — In *Dean v. American Mut. Life Ins. Co.*<sup>1</sup> the Supreme Court of Massachusetts established a different rule of construction. In that case the condition was that the policy should be void if the insured should “die by his own hand,” and the court elaborately reviewed the cases and arguments in support of both sides of the question, concluding that, if the person understood the nature of the act and intended to take his own life, though insane, the policy was avoided. Judge Bigelow, in the opinion, said: “The question in such cases is not, how far can the literal meaning of words be extended; but, what is a reasonable limitation and qualification of them, having regard to the nature of the contract and the objects intended to be accomplished by it. Applying this principle to the present proviso, and assuming that the plaintiffs are right in their position that the words are not to be inter-

later cases in the same State it is held that the words, “die by his own hand,” have reference to, “an intelligent, voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary.” *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 235; *Weed v. Mut. Ben. Life Ins. Co.*, 70 N. Y. 561; *Newton v. Mut. Ben. Life Ins. Co.*, 76 N. Y. 426; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 321. *Estabrook v. Union Mut. L. Ins. Co.*, 54 Me. 224, approved *Breasted v. Farmers’ L. & T. Co.*, *supra*, holding that suicide to avoid a policy of life insurance must be a criminal act, one done with an evil motive. The rule as stated in the text is approved by the following cases, omitting all decided in the United States Circuit Courts, as necessarily they are bound by the decisions of the Supreme Court of the United States. *Hathaway v. National Life Ins. Co.*, 48 Vt. 335; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; 19 Am. Rep. 623; *Conn. Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; 27 Am. Rep. 689, which modifies *Am. Life Ins. Co. v. Isett*, 74 Pa. St. 176; *Scheffer v. National Life Ins. Co.*, 25 Minn. 534; *Phillips v. La. Ann. Ins. Co.*, 26 La. Ann. 404; 21 Am. Rep. 549; *Merritt v. Cotton States Life Ins. Co.*, 55 Ga. 103; 59 *Id.* 564; *Life Association, etc., v. Waller*, 57 Ga. 533; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush, 268; *Schultz v. Insurance Co.*, 40 Ohio St. 217; *Meacham v. N. Y. State Mut. Ben. Assn.*, 46 Hun, 363.

<sup>1</sup> 4 Allen, 96.

preted literally, it would seem to be reasonable to hold that they were intended to except from the policy all cases of death caused by the voluntary act of the assured, when his deed of self-destruction was the result of intention, by a person knowing the nature and consequences of the act, although it may have been done under an insane delusion, which rendered the party morally and legally irresponsible, incapable of distinguishing between right and wrong, and which, by disturbing his reason and judgment, impelled him to its commission. If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But beyond this, it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adapting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted, within the meaning of the proviso. A party cannot be said to die by his own hand, in the sense in which those words are used in the policy, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse, of mistake or accident, or of other circumstances over which the will can exercise no control." In a subsequent case in the same court this opinion was adhered to.<sup>1</sup>

§ 336. **Death by Suicide "Sane or Insane."** — To avoid the effect of these decisions it has become customary with

<sup>1</sup> *Cooper v. Mass. Ins. Co.*, 102 Mass. 227; 1 Big. L. & Acc. Ins. Co. 758. This same doctrine was laid down in several cases in the Federal court, but those have been overruled by the Supreme Court of the United States. See *Nimick v. Mut. Ben. L. Ins. Co.*, 3 Brewst. 502; *Gay v. Union Mut. L. Ins. Co.*, 9 Blatchf. 142.

life insurance companies to insert in their policies a stipulation that the contract shall be void if the insured shall "die by suicide, felonious or otherwise, sane or insane," or "by suicide, sane or insane," or "die by his own act or hand sane or insane." These conditions have been generally upheld and successfully eliminate the element of suicide, so that no kind or degree of insanity will prevent the avoidance if the insured had the *intent* to do the act, or realized the physical consequences of his act.<sup>1</sup> This condition does not attach where there is an absence of intent, as in case of an accident.<sup>2</sup> Culpable negligence, as in taking an overdose of laudanum to relieve pain, will not vitiate the contract.<sup>3</sup> Where the condition was that the policy should be void if the insured should die by his own act or hand "voluntary or otherwise," the latter word was held too vague and uncertain to cover a case where the insured took his own life while insane.<sup>4</sup> In a case in Ohio,<sup>5</sup> where the policy was to be void if the insured "shall under any circumstances die by his own hand," the court held that the words "under any circumstances" should be disregarded as too general and indefinite.

<sup>1</sup> *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; 5 Big. L. & A. Ins. Cas. 498; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; *Sup. Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Riley v. Hartford L. & A. Ins. Co.*, 25 Fed. Rep. 315; *Chapman v. Republic L. Ins. Co.*, 6 Biss. 238; *Adkins v. Columbia L. Ins. Co.*, 70 Mo. 27; 35 Am. Rep. 410; *De Gogorza v. Knickerbocker L. Ins. Co.*, 65 N. Y. 232, *Streeter v. Western Union, etc., Soc. (Mich.)*, 31 N. W. Rep. 779; 8 West. Rep. 183.

<sup>2</sup> *Edwards v. Travelers' L. Ins. Co.*, 22 Blatchf. 225; 20 Fed. Rep. 661; *Penfold v. Universal L. Ins. Co.*, 85 N. Y. 317; 39 Am. Rep. 660; *Keels v. Mut. Reserve F. L. Ins. Co.*, 29 Fed. Rep. 198; *Suppiger v. Covenant M. B. Assn.* 20 Bradw. 595.

<sup>3</sup> *Mut. L. Ins. Co. v. Lawrence*, 5 Bradw. 280.

<sup>4</sup> *Jacobs v. National L. Ins. Co.*, 1 McArthur, 632; 5 Big. L. & Acc. Ins. Cas. 42; 4 Ins. L. J. 339.

<sup>5</sup> *Schultz v. Ins. Co.* 40 Ohio St. 217.

§ 337. **When Suicide no Defense.** — Where the policy, or the constitution and laws of the society or order, contain no provision qualifying the right to recover if the assured or member takes his own life, suicide is not a defense.<sup>1</sup> It is a question, however, whether, if suicide was a crime under the statute law, a death by suicide would not be within a condition vitiating the policy if the assured should die in violation of, or any attempt to violate any criminal law of the United States or of the State or country where the member may be.<sup>2</sup> A benefit society however may enact a law, providing that the benefit shall be forfeited if the member take his own life “sane or insane,” which will bind all members irrespective of the time when they became such, whether before or after the enactment of such law, provided the certificate or laws stipulate that the member shall comply with all the laws of the order then in force or those which may subsequently be enacted.<sup>3</sup>

§ 338. **Death at the Hands of Justice.** — A majority, if not all life insurance policies contain conditions that they are to be void if the insured die “by the hands of justice” or in “known violation of law.” It was held in the celebrated *Fauntleroy’s* case<sup>4</sup> that it is unnecessary to insert a provision of the first kind, because the policy is void in such event upon the grounds of public policy, even though death at the hands of justice were expressly insured against. Death at the hand of justice means, says Chief Justice Tindal, the dying “in consequence of a felony previously committed.”<sup>5</sup> In

<sup>1</sup> *Mill v. Rebstock*, 29 Minn. 380; *Darrow v. Family Fund Soc.*, 42 Hun, 245; *Freeman v. National Benefit Soc.*, *Id.* 252; *Fitch v. Am. Popular Life Ins. Co.*, 59 N. Y. 557; *Patrick v. Excelsior L. Ins. Co.*, 67 Barb. 202; 4 Hun, 263.

<sup>2</sup> *Darrow v. Family Fund Soc.*, *supra*.

<sup>3</sup> *Supreme Commandery, etc., v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332.

<sup>4</sup> *Amicable Soc. v. Bolland*, 2 Dow. & C. 1; 4 Bligh (N. S.), 194.

<sup>5</sup> *Borradaile v. Hunter*, 5 M. & G. 639.

a case in North Carolina<sup>1</sup> the policy was on the life of a slave and conditioned to be void if the insured should meet death “by means of invasion, insurrection, riot or civil commotion, or of any military or usurped authority, or by the hands of justice.” The slave was killed in an armed and violent resistance of the authority of an officer and the Supreme Court of that State held that the policy was not avoided.

§ 339. **Death in Violation of Law.** — In a case where the policy was conditioned to be void if the insured should die in consequence of a duel, or of the violation of law,<sup>2</sup> the Court of Appeals of New York said: “It seems to be clear that a relation must exist between the violation of law and the death to make good the defense; that the death must have been caused by the violation of law.” This rule was followed in a later case in the same court<sup>3</sup> in which the facts were these: Wisner Murray, the insured, and his brother planned an assault upon one Berdell, in pursuance of which the brother seized Berdell by his arms, from behind, and Wisner beat him over the head and face with a rawhide. Berdell drew a pistol and Wisner fled, but was shot and killed by Berdell as he was entering an adjoining room. The court held that whether the discharge of the pistol was intentional or accidental the death was the result of the violation of law by Wisner Murray and the policy was held void. So where the insured was killed while making an unprovoked assault the policy, under a similar condition was held void.<sup>4</sup> So, under a similar proviso the policy was held void where the insured was killed by his brother while making an assault upon the wife

<sup>1</sup> Spruill v. North Carolina, etc., Ins. Co., 1 Jones L. 126.

<sup>2</sup> Bradley v. Mut. Ben. Life Ins. Co., 45 N. Y. 422.

<sup>3</sup> Murray v. New York Life Ins. Co., 96 N. Y. 614.

<sup>4</sup> Wolff v. Com. Mut. Life Ins. Co., 5 Mo. App. 236.

of the latter.<sup>1</sup> In a case decided by the Supreme Court of the United States<sup>2</sup> the policy was to be void if death was caused by "dueling, fighting, or other breach of the law on the part of the insured, or by his willfully exposing himself to any unnecessary danger or peril." The insured and another person were driving sulkies in competition alongside of each other at a horse race for money, such race being illegal by statute, and on a collision occurring, the insured jumped to the ground from his sulky, and was clear from the sulky reins and harness, on his feet and uninjured, and spoke instantly to his horse to stop, and then started forward to get hold of the reins, which were hanging across the axle-tree. When he had hold, or was attempting to get hold of them he was tangled in them, and falling down was dragged along the ground and striking a stone violently with his head was killed. The court held that no recovery could be had on the policy. It was claimed that the death was caused by a new force or cause; but Judge Miller, in delivering the opinion of the court, said: "But we do not think this new force or cause is sufficiently made out by this verdict. The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver, are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed. If he had been landed safely from his sulky and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit when the race was lost, might have been too remote to bring the case within the exception. But as the finding presents it, we cannot say that the accident was not caused by the

<sup>1</sup> Bloom v. Franklin Life Ins. Co., 97 Ind. 478.

<sup>2</sup> Ins. Co. v. Seaver, 19 Wall 531.



race, which was itself a violation of the law, and which might still have gone on had he caught his mare in time.” But where the insured was killed by the husband of the woman with whom he had immediately before committed adultery, the Supreme Court of New York<sup>1</sup> held that it could not be said that the insured died in the violation of law, because the killing was not done while the insured was in the act of adultery, nor in the defense of person or property, and therefore was a crime and was not a natural and legitimate effect of the act of adultery. And where the condition was that the policy should be void if the assured should die “in the known violation of any law of this State,” the Supreme Court of Missouri<sup>2</sup> held that under this clause the policy would not be avoided, if the insured was killed after retreating from an altercation which he had commenced, under circumstances which would make the slayer guilty of felonious homicide. The facts were that one Coryell was talking to a man, Wilson, near the store of a brother of Harper, the insured. The deceased spoke to Wilson and asked him if he knew to whom he was talking and to keep his hand on his pocket. Coryell inquired if that insult was intended for him and Harper said it was. The parties then quarreled, the deceased drew a single barreled pistol and snapped it at Coryell who thereupon drew a revolver and advanced on Harper, who threw his pistol and struck Coryell and retreated into the store. Coryell shot and missed him while he was in the store. Then the deceased retreated under a stairway and picked up a stick of wood which he raised in a threatening position over his head, but did not advance on Coryell, nor attempt to use the stick in any other manner. Coryell then fired again and killed the deceased. The whole difficulty was one continuous quarrel. The court said that life

<sup>1</sup> *Goetzman v. Conn. Mut. L. Ins. Co.*, 3 Hun, 515; 5 N. Y. St. C. 572.

<sup>2</sup> *Harper v. Phoenix Ins. Co.*, 19 Mo. 506.

insurance companies take the subject insured with his flesh, blood and passions and that "the dangers to which the lives of men are exposed from sudden ebullitions of feeling, are a lawful matter of insurance." It concluded: "The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact, set up as a bar that Coryell slew Harper in self-defense. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. His having a stick of wood in his hand at the time he was slain, did not in the least, extenuate the guilt of Coryell. Under the circumstances, Harper would have been justified had he slain Coryell. \* \* \*

Now, if one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is, thereby, guilty of a felony, is it not a gross perversion of language to say that that person died in the known violation of a law of the land?"<sup>1</sup> A series of interesting decisions upon the question were given in suits brought upon policies upon the life of one Cluff, which were conditioned to be void if the insured should die "in the known violation of any law of these States or of the United States, or of the said provinces, or of any other country which he may be permitted under this policy to visit or reside in." Cluff was killed in Louisiana by one Cox. The father of the latter owed Cluff a debt and Cluff meeting the son driving a wagon and horses asked him if they were going to move. The reply was yes. He then asked when they were going to pay his debt; the son said they were not going to pay it at all. The deceased then seized the horses and began to unhitch them. The testimony was conflicting whether the boy and Cluff had a scuffle and blows, after which the boy started to the house

<sup>1</sup> This rule was again affirmed in *Overton v. St. Louis Mut. L. Ins. Co.*, 39 Mo. 122.

and then turned about and shot, or whether the boy got off of the wagon and after some talk started to go to the house and then turned and fired, but it was agreed that he ran about three rods, drew a pistol and fired, killing Cluff. One suit was brought in Massachusetts<sup>1</sup> and four trials were had. Upon the first trial it was held as a matter of law that upon the evidence the plaintiff must recover. This was reversed by the Supreme Court,<sup>2</sup> the court holding that the jury were to say whether the insured, when he was shot, was engaged in a criminal violation of law, known by him to be so, and that such violation might have been reasonably expected to expose him to violence which might endanger life. On a second trial the jury on the same evidence found for the plaintiff. On appeal the Supreme Court held<sup>3</sup> that the company must prove, in order to avoid the policy on this ground, that the insured died while engaged in a voluntary criminal act, known by him at the time to be a crime against the laws of such State or country. That those acts which are criminal by the common law and the laws of all civilized countries will be presumed to be criminal by the laws of the States of the Union and he will be presumed to have known that they are so. If there is evidence tending to show that the insured was killed by being shot while engaged in the commission of a robbery and assault and battery, and it is in dispute, whether, if he had been so engaged, he had desisted therefrom, it must appear, in order to exonerate the company from liability, that such criminal act was not so far completed as to render the shooting a new and distinct event, rather than a mere continuation of the original affray, and that the death was in consequence of the crime of the insured; but it need

<sup>1</sup> Cluff v. Mut. Benefit L. Ins. Co., 13 Allen, 308; 99 Mass. 317.

<sup>2</sup> 13 Allen, 308, *supra*.

<sup>3</sup> 13 Allen 308, *supra*.

not be proved that the insured knew or had reason to believe that his criminal act would or might expose his life to danger. On the third trial the jury also found for plaintiff but the Supreme Court held<sup>1</sup> that instructions were erroneous which permitted the jury to understand that the policy was not avoided, although the insured was killed while doing what would constitute either robbery or larceny, if he acted under a belief which would avoid the otherwise criminal character of his acts, and that such a belief need not be a belief in his legal right to do the acts, but might be a belief in a right of self-redress by reason of the disturbed condition of the country, the inefficient administration of the laws, or otherwise. Upon an appeal after a fourth trial, in which a verdict was again found for plaintiff,<sup>2</sup> the Supreme Court held that the fact that the judge did not comply with a request to instruct the jury that the insured must be presumed to have known the civil law of the State where he was killed was not a valid ground of exception, if he did instruct them that the insured had no right to do the acts in the commission of which he was killed, and that he must be presumed to have known the criminal laws of the State. In the opinion the court says: "The judge having stated to the jury that Cluff had no right to take the property, the material question to be submitted to them on this point was, whether he took it with a felonious intent, and not whether he took it with a knowledge that he was violating the civil law of the State." The court, in these cases, held that the proviso must be construed to refer to a voluntary criminal act on the part of the insured, known by him at the time to be a crime against the law of the State, and not to mere trespass against property or infringements of civil laws to which no criminal consequences are attached. This conclusion was

<sup>1</sup> 99 Mass. 317.

<sup>2</sup> 99 Mass. 317, *supra*.

based upon the natural import of the words "known violation of law" and upon their being found immediately following the words "by the hands of justice." In this view the court agrees with the doctrine of *Harper v. Phoenix Ins. Co.*<sup>1</sup> Suit was subsequently brought in New York upon another policy issued by the same company upon the same life, and, upon substantially the same evidence as presented in Massachusetts, the lower court ordered judgment in favor of the defendant. The Supreme Court affirmed this ruling, but the Court of Appeals reversed it,<sup>2</sup> the majority of the court holding that it was error not to allow the jury to pass upon the question whether the death of the insured was caused by a known violation of law upon his part, and whether the act of the deceased which produced the death was a natural, reasonable or legitimate consequence of the act of the insured. The majority of the court inclined to follow the reasoning of the Massachusetts cases, holding that the proviso did not extend to mere trespasses. The opinion concludes thus: "It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall within the proviso, for no one would hesitate to say, that in the case supposed, the unlawful act of the deceased was a totally inadequate cause for the killing. Yet between such an act as that, and one which would in law justify the killing of the offender, there are an infinity of supposable cases involving different degrees of provocation, which cannot be measured so as to determine, as matter of law, their adequacy to produce a fatal result; and it can hardly be laid down as a rule of law, that an attempt to take one's horses for debt, without process, but without any threat of personal violence,

<sup>1</sup> 19 Mo. 506, *supra*.

<sup>2</sup> *Bradley v. Mutual Benefit L. Ins. Co.*, 45 N. Y. 422.

is of itself an adequate cause for intentionally killing the offender, and that a killing during or immediately after such an attempt, must necessarily be held a legitimate consequence of the act. Such an act may lead to violence, and if any act of violence of the character which would naturally be resorted to, as a measure of resistance, should result in death, the necessary connection between the original illegal act, and the death, might be established. But the intentional killing of another with a deadly weapon under such circumstances, is a totally different affair, and cannot be held as matter of law, to be a natural or reasonable result or consequence of the original offense." The minority of the court dissented from these views, holding that "when the death occurs during the known violation of law by the assured, when such violation eminently tends to violence dangerous to his life, the case comes within the proviso." In a comparatively recent case in Indiana,<sup>1</sup> the Supreme Court of that State disapproved the doctrine of the Massachusetts' court in the Cluff case and approved that laid down by the dissenting judges in the New York case as above, holding that death in the known violation of any law criminal or civil would make the policy inoperative. "In our opinion," says the court, "the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation are to increase the risk: a violation of law, whether the law is a civil or a criminal one, does not avoid the policy, if the natural and reasonable consequence of the act does not increase the risk." The cases all agree that the wrongful act must have been the proximate cause of the death. The loss of life must be connected with the crime as its consequence. By reason of the guilty act the death must have occurred, so that without its commission it would not have

<sup>1</sup> Bloom v. Franklin L. Ins. Co., 97 Ind. 478, *supra*.

taken place. Whether the violation of law was the proximate cause of death and whether it was an act increasing the risk, must in general be determined from the facts of the particular case. There must be some causative connection between the act which constituted the violation of law and the death of the assured.<sup>1</sup> If the policy provides that it shall be void if the insured "die while violating any law," it has been held that the death must occur at the time of the criminal act, not after.<sup>2</sup> In this case the assured robbed the State treasurer and while leaving the building was killed by a policeman. The court held that the words meant death in the actual violation of law, and that in this case, as the act had been completed, and the death occurred afterwards, there was no forfeiture. Where the policy was to be void if death happened "while engaged in or in consequence of any unlawful act," it was held that it cannot be said as a matter of law that if a soldier, insured thereunder, deserts and is shot, as alleged, in self-defense, by a police officer who is attempting to arrest him, he meets death while engaged in an unlawful act.<sup>3</sup>

§ 340. **Where Recovery is Precluded because of Public Policy.** — In a case in Massachusetts the insured voluntarily, and without any justifiable medical reason, submitted herself to an illegal operation with intent to cause an abortion and died from the consequences of the miscarriage thereby effected. The court held that there could be no recovery on the ground of public policy,<sup>4</sup> saying: "No recovery can be had in this case, because the

<sup>1</sup> *Bloom v. Franklin L. Ins. Co.*, 97 Ind. 478; *Cluff v. Mut. Ben. L. Ins. Co.*, 13 Allen, 308; 99 Mass. 317; *Bradley v. Mut. Ben. L. Ins. Co.*, 45 N. Y. 422; 3 Lans. 341; *Murray v. New York L. Ins. Co.*, 96 N. Y. 614; *Ins. Co. v. Seaver*, 19 Wall. 531.

<sup>2</sup> *Griffin v. Western Mut. B. Assn.*, 20 Neb. 620; 31 N. W. Rep. 122.

<sup>3</sup> *Utter v. Travelers' Ins. Co. (Mich.)*, 32 N. W. Rep. 812; 9 West. Rep. 108.

<sup>4</sup> *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550.

act on the part of the assured causing death was of such a character that public policy would preclude the defendant from insuring her against its consequences; for we can have no question that a contract to insure a woman against the risk of her dying under, or in consequence of an illegal operation for abortion, would be contrary to public policy, and could not be enforced in the courts of this commonwealth." <sup>1</sup>

<sup>1</sup> The court cites *Amicable Society v. Bolland*, 4 Bligh (N. S.), 194; *Horn v. Anglo-Australian Ass. Co.*, 30 L. J. (N. S.) Ch. 511; *Moore v. Woolsey*, 4 E. & B. 243.



## CHAPTER XI.

### PREMIUM, ASSESSMENTS AND DUES.

- § 350. The Consideration of a Life Insurance Contract is called Premiums or Assessments.
- 351. All the Premiums the Consideration: Insurance Contract not one from Year to Year.
- 352. Non-Payment of Premium will not Effect a Forfeiture unless so Stipulated.
- 353. Policy does not Attach until First Premium is Paid if the Contract so Provides.
- 354. Time of Payment of Premium is of the Essence of the Contract.
- 355. When Punctual Payment is not Excused.
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- 387. Power to Accumulate Surplus from Assessments.
- 388. Power of Subordinate Lodges to Waive Requirements of Laws of the Order as to Assessments.
- 389. Dues.

§ 350. **The Consideration of a Life Insurance Contract is Called Premiums or Assessments.** — The consideration of a contract of life insurance is usually called premiums when paid to the ordinary life insurance companies and assessments when paid to mutual beneficiary societies. Neither the name given to this consideration nor the time of its payment, either in one sum, or annually, or upon the uncertain times of the deaths of the members of the society, affect the validity of the contract or make it any less one of insurance.<sup>5</sup> Nor can we see any reason why different rules should govern the payment of premium to regular companies from those that apply to the assessments of the benevolent orders, except so far as affected by the terms of the agreement between the parties. The contracts of the companies and those of the orders have substantial elements of similarity, and the same principles should be applied to both wherever practicable. The payment of the consideration is an important condition in all contracts of life insurance and the subject merits careful examination.

§ 351. **All the Premiums the Consideration: Insurance Contract not one from Year to Year.** — There is a want

<sup>1</sup> *Ante*, § 162

of harmony in the authorities as to the real nature of the contract of life insurance in respect to the consideration. For example, the Supreme Court of Connecticut says: <sup>1</sup> “A contract of life insurance is a peculiar contract. It has no parallel and few analogies in all the business transactions of life. An ordinary life policy, like the one in suit, requiring the payment of annual premiums, consists of two parts and is divisible. The applicant, upon the payment of the first premium, effects an insurance upon his life for one year, and purchases a right to continue that insurance from year to year, during life, at the same rate. Whether he will continue it or not is optional with him. The premium for the first year pays for the risk during that year, and for the right to subsequent insurance. The rate of insurance for a single year is less than the annual premiums on a life policy. The difference continued, as it is supposed it will be, from year to year during life, may be regarded as the consideration for the right to continue the insurance. \* \* \* The defendants, for a valuable consideration, made an irrevocable proposition to insure the applicant during life upon certain terms and conditions. He was at liberty to accept or reject the proposition. If he accepted he was to comply with the condition and pay the premium on or before a given day. \* \* \* We regard the payment of the premiums as a condition precedent to any subsequent liability on the part of the defendants.” On the other hand, the better rule has been laid down by the majority of the Supreme Court of the United States as follows: <sup>2</sup> “The contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such

<sup>1</sup> *Worthington v. Charter Oak Life Insurance Co.*, 41 Conn. 399.

<sup>2</sup> *New York L. Ins. Co. v. Statham*, 93 U. S. 24.

is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual installments. Such installments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each installment is, in fact, part consideration of the entire insurance for life. It is the same thing where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong and healthy, is manifestly not the same when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.”<sup>1</sup> The payment of a premium in either case operates merely to continue the old contract.<sup>2</sup>

**§ 352. Non-payment of Premium will not Effect a Forfeiture Unless so Stipulated.**—The parties to a contract of insurance are free to insert in it whatever conditions they please, provided there be nothing in them contrary to the

<sup>1</sup> *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Dungan v. Mut. Ben. L. Ins. Co.*, 46 Md. 469–492.

<sup>2</sup> *Mutual Ben. L. Ins. Co. v. Robertson*, 59 Ill. 123, and cases cited; *post*, § 356.

criminal law or public policy,<sup>1</sup> and consequently they may agree that the policy shall be forfeited for non-payment of premium at the appointed day. But, in the absence of any stipulation so providing, the non-payment of a premium will not effect a forfeiture.<sup>2</sup> The question of forfeiture arises oftener in cases where premium notes are given, and then the effect of non-payment has been uncertain under varying provisions of the contract, and will be considered under that division of the subject.<sup>3</sup> While all the cases show that the courts construe provisions for forfeiture for non-payment of premium strictly, so as to prevent forfeiture if possible, they nevertheless uphold the contract and enforce it.<sup>4</sup>

**§ 353. Policy does not Attach Until First Premium is Paid if Contract so Provides.** — By signing the application and accepting the policy the insured is deemed to have had notice of, understood and agreed to the terms, limitations and conditions contained in the application and the policy, and if the latter provides that it shall not take effect until the advance premium is paid during the life time of the assured, then, unless such payment is made, the policy does not attach and the delivery of the receipt without payment avails nothing.<sup>5</sup> Delivery of the policy by an agent contrary to instructions and by mistake will not make the company liable.<sup>6</sup> If, however, the custom of the agents to give credit was known and acquiesced in by the receipt of such premium after the time, the company will be taken to

<sup>1</sup> *Beadle v. Chenango Mut. Ins. Co.*, 3 Hill (N. Y.), 161.

<sup>2</sup> *Woodfin v. Asheville Mut. Ins. Co.*, 6 Jones L. 558; *American Ins. Co. v. Klink*, 65 Mo. 78.

<sup>3</sup> *Post*, § 372.

<sup>4</sup> *Ala. Gold L. Ins. Co. v. Thomas*, 74 Ala. 578; *Mound City M. L. Ins. Co. v. Twining*, 12 Kan. 475.

<sup>5</sup> *Brown v. Insurance Co.*, 59 N. H. 298; *Ormond v. Mut. L. Assn.*, 96 N. C. 158; 1 S. E. Rep. 796; *Davis v. Mass. M. L. Ins. Co.*, 13 Blatchf. 462.

<sup>6</sup> *Charter Oak L. Ins. Co. v. Smith*, 3 Cin. L. Bul. 607.

have waived the requirement,<sup>1</sup> and a general agent has power to waive this condition.<sup>2</sup> But where the receipt of the premium is acknowledged in the policy the insurers will not be heard to deny the fact, unless they can show that the acknowledgment was made by fraud, error or duress.<sup>3</sup> It has been held that payment of the first premium and acceptance of the policy is a personal act and so, if a policy provide that it shall not take effect "until the advance premium shall have been paid during the life time of the person whose life is hereby insured," a payment of such premium by a third person, without the knowledge of the assured, is of no effect, although made with his money; and his administrator cannot ratify the act.<sup>4</sup>

**§ 354. Time of Payment of Premium is of the Essence of the Contract.** — In life insurance contracts, if the policy is conditioned to be void if the stipulated premium be not paid at the appointed day, time is of the essence of the contract and if the premium be not paid the policy is void unless the condition be waived.<sup>5</sup> And it does not avail that

\* *Tennant v. Travelers' L. Ins. Co.*, 31 Fed. Rep. 322; *Miller v. Life Ins. Co.*, 12 Wall. 285.

² *O'Brien v. Union Mut. L. Ins. Co.*, 22 Fed. Rep. 586; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606; *Goit v. National Protection Ins. Co.*, 25 Barb. 189.

³ *Michael v. Mut. Ins. Co.*, 10 La. Ann. 737; *Ill. Cent. Ins. Co. v. Wolf*, 37 Ill. 354; *Teutonia L. Ins. Co. v. Mueller*, 77 Ill. 22; *Consolidated, etc., Ins. Co. v. Cashow*, 41 Md. 59; *Goit v. National Protection, etc., Ins. Co.*, 25 Barb. 189; *Kline v. National Ben. Assn.*, 111 Ind. 462; 11 N. East. Rep. 620; 9 West. Rep. 284; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Madison Ins. Co. v. Fellowes*, 1 Disn. 217; 2 Disn. 128; *Basch v. Humboldt, etc., Ins. Co.*, 35 N. J. 429; *Calhoun v. Union Mut. L. Ins. Co.*, 3 Pugs. & B. (N. B.) 13.

\* *Whiting v. Mass. Mut. L. Ins. Co.*, 129 Mass. 240; citing *Hoyt v. Mut. Ben. L. Ins. Co.*, 98 Mass. 539; *Markey v. Mut. Ben. L. Ins. Co.*, 103 Mass. 78; *Badger v. American Ins. Co.*, 103 Mass. 244; *Thayer v. Middlesex Ins. Co.*, 10 Pick. 326; *Piedmont & Arlington Ins. Co. v. Ewing*, 92 U. S. 377.

⁵ *Williams v. Washington L. Ins. Co.*, 31 Ia. 541; *Ayer v. New En-*

at the time the policy was taken out it was verbally agreed that the payment of the premium should be extended beyond the time stated.<sup>4</sup>

§ 355. **When Punctual Payment is not Excused.** — An excuse for the payment of premiums, which is in the nature of a condition precedent or subsequent as the contract is looked at, only exists when the company has prevented performance of such conditions or payment, or has itself wholly refused to perform or wholly disabled itself from completing a substantial performance. The mere failure of the company to perform some of the obligations of the contract, which go to a part only of the consideration and which breach may be paid for in damages, is not sufficient. Nor is the breach of representations made during the pendency of negotiations for a contract actionable or an excuse for performance by the other party.<sup>2</sup> Nor is it an excuse that the company has violated its charter, and in consequence of such wrongful acts become insolvent, so that it had become unsafe for the insured to pay further premiums, if the company was continuing to do its ordinary business in the ordinary way and was ready to receive premiums.<sup>3</sup> Nor that the company has in its hands an amount applicable to a dividend soon to be declared, which would, when so declared, belong to the insured.<sup>4</sup> Nor that the company re-

gland Mut. L. In. Co., 109 Mass. 430; Shaw v. Berkshire L. Ins. Co., 103 Mass. 254; Klein v. Ins. Co., 104 U. S. 88; Catoir v. American L. Ins., etc., Co., 33 N. J. L. 487; Mobile L. Ins. Co. v. Pruett, 74 Ala. 487; Franklin L. Ins. Co. v. Sefton, 53 Ind. 380; Gaterman v. American L. Ins. Co., 1 Mo. App. 300; Security L., etc., Ins. Co. v. Gober, 50 Ga. 404; Ala. Gold Life Ins. Co. v. Garmany, 74 Ga. 51.

<sup>1</sup> Coombs v. Charter Oak L. Ins. Co., 65 Me. 382.

<sup>2</sup> Bogardus v. New York L. Ins. Co., 101 N. Y. 328.

<sup>3</sup> Taylor v. Charter Oak L. Ins. Co., 9 Daly, 489; 59 How. Pr. 468; 8 Abb. N. C. 331.

<sup>4</sup> Mut. L. Ins. Co. of N. Y. Girard, etc. Co., 100 Pa. St. 172.

tains the policy as the bailee of the insured.<sup>1</sup> Nor that the insurance company has failed to place the receipt for the premium in the hands of the local agent.<sup>2</sup> Nor the death of the local agent where, by the terms of the policy, the premiums are payable at the home office of the company, "unless otherwise expressly agreed in writing, or to agents when they produce receipts signed by the president or secretary."<sup>3</sup> It is no excuse for non-payment of premium that at the time the payment was to be made the assured was sick and delirious. In holding that this is not a case where performance is prevented by act of God, the Supreme Court of Iowa says:<sup>4</sup> "There was no such impossibility of performing the contract in this case. It is true, it was impossible for the assured at the time required therein to perform it; but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the policy before her husband's death does not change the case. Prudence and care on the part of the assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time therein prescribed."<sup>5</sup> For the same reasons insanity is also no excuse for non-payment of premiums on the day agreed.<sup>6</sup>

<sup>1</sup> Howard v. Mut. Ben. L. Ins. Co., 6 Mo. App. 577.

<sup>2</sup> Morey v. New York L. Ins. Co., 2 Woods, 664.

<sup>3</sup> Bulgar v. Washington L. Ins. Co., 63 Ga. 328.

<sup>4</sup> Carpenter v. Centennial Mutual Life Assn., 68 Ia. 453; 27 N. W. Rep. 456.

<sup>5</sup> Smith v. Penn. Mut. L. Ins. Co., 11 W. N. C. 295; Scully v. Kirkpatrick, 79 Pa. St. (29 P. F. Smith) 324; Klein v. Ins. Co., 104 U. S. 88; Yoe v. B. C. Howard Masonic M. Ben. Assn., 63 Md. 86; Howell v. Knickerbocker L. Ins. Co., 44 N. Y. 276.

<sup>6</sup> Wheeler v. Conn. Mut. L. Ins. Co., 82 N. Y. 543; 16 Hun, 317; Hawkshaw v. Knights of Honor, 29 Fed. Rep. 770; Thompson v. Ins. Co., 104 U. S. 252.



§ 356. **Effect of War on the Contract.**—The Supreme Court of the United States has held,<sup>1</sup> that a life insurance policy, which stipulates for the payment of an annual premium, and that it shall be void for non-payment, makes the premium an annuity, the whole of which is the consideration for the contract; and the condition is a condition subsequent, the non-performance of which renders the policy void. If a failure to pay was caused by war, a forfeiture follows, nevertheless, if the insurer insists on the condition; but the insured is entitled to the equitable value of the policy arising from the payments actually made. Upon this question, however, there is decided difference of opinion, but the rule laid down above seems to be supported by the weight of reasoning as well as of authority.<sup>2</sup> There is excellent authority, however, opposed to the above rule and which holds that war does not dissolve the contract, but merely suspends it.<sup>3</sup>

§ 357. **No Absolute Liability on the Part of the Assured to Pay the Premium if Payment is only a Condition, and there is no Promise to Pay.**—In a contract of

<sup>1</sup> *New York L. Ins. Co. v. Statham*, 93 U. S. 24; *New York L. Ins. Co. v. Davis*, 95 U. S. 425.

<sup>2</sup> *Abell v. Penn. Mut. L. Ins. Co.*, 18 W. Va. 400; *Tait v. New York L. Ins. Co.*, 1 Flip. 288; *Bird v. Penn. Mut. L. Ins. Co.*, 11 Phila. 485; 2 W. N. C. 410; *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; *Hancock v. N. Y. Life Ins. Co.*, 13 Am. L. Reg. (N. S.) 103.

<sup>3</sup> *Mut. Ben. L. Ins. Co. v. Hillyard*, 37 N. J. L. 444; *Hillyard v. Mut. Ben. L. Ins. Co.*, 35 N. J. L. 415; *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610; *Martine v. International L. Ass. Soc.*, 53 N. Y. 339; 62 Barb. 181; 5 Lans. 535; *Sands v. N. Y. Life Ins. Co.*, 50 N. Y. 626; 59 Barb. 556; *Robinson v. International L. Ass. Soc.*, 42 N. Y. 54; 52 Barb. 450; *New York L. Ins. Co. v. Clopton*, 7 Bush, 179; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. 614; *Mut. Ben. L. Ins. Co. v. Atwood*, 24 Gratt. 497; *N. Y. L. Ins. Co. v. Hendren*, *Id.* 536; *Conn. Mut. L. Ins. Co. v. Duereson*, 28 Gratt. 630; *Clemmitt v. New York L. Ins. Co.*, 76 Va. 355; *Statham v. N. Y. L. Ins. Co.*, 45 Miss. 581, where a tender was held to have preserved the rights of the insured.

life insurance there is generally no absolute undertaking of the insured to pay the premiums, or assessments, and consequently no personal liability therefor. The payment of the premium, or assessments, is only a condition precedent of the liability of the company: the insured does not promise to pay the premiums and the company only promises to pay if it has received the agreed consideration. Therefore the insured may pay or not as he pleases, he has the perfect right to do either and need give no excuse for his choice. If he does not pay the contract is ended. It follows, therefore, that the premium, or assessment, is only a debt when there is an absolute promise to pay embodied in the contract.<sup>1</sup>

§ 358. **Time of Payment of Premium may be Extended.** — The company, however, or an authorized agent may extend the time of payment of a premium and such extension will be sustained. It is a question of fact whether an extension has been given.<sup>2</sup> But where the policy has been forfeited by a violation of one of its conditions, and not by the non-payment of premiums only, so that the policy is void, a mere promise made thereafter without consideration, to continue the policy in existence upon the payment of an additional premium, which is thereafter tendered, but not accepted by the company, will not be enforced.<sup>3</sup> Where the assured has been in the habit of paying his premiums after they became due in accordance with a promise of accommodation the company cannot end

<sup>1</sup> New York L. Ins. Co. v. Statham, 93 U. S. 24; Worthington v. Charter Oak L. Ins. Co., 41 Conn. 372; Dungan v. Mut. Ben. L. Ins. Co., 46 Md. 492; Manhattan L. Ins. Co. v. Smith, 44 Ohio St. 156; and, indeed, all the authorities cited in this chapter.

<sup>2</sup> Dean v. Aetna L. Ins. Co., 62 N. Y. 642, affg. 2 Hun, 358; Palmer v. Phoenix Mut. L. Ins. Co., 84 N. Y. 63; Fitzpatrick v. Mutual, etc., Assn., 25 La. Ann. 443; McCraw v. Old North State, etc., Ins. Co., 78 N. C. 149; Winindger v. Globe Mut. L. Ins. Co., 3 Hughes, 257.

<sup>3</sup> Evans v. United States L. Ins. Co., 3 Hun, 587.

such indulgence and insist upon prompt payment without notice.<sup>1</sup>

§ 359. **Excuses for Non-payment.** — One holding a policy of life insurance does not forfeit his policy by omitting to pay the annual premiums thereon after the company issuing the policy has ceased to do business, transferred all its assets and become insolvent, or after a receiver has been appointed.<sup>2</sup> Nor when the insurer is a foreign company and has ceased to do business in the place where the premium is specified to be payable, and has no known agent there.<sup>3</sup> A company has no right to turn its policy holders over to another company without their consent, and if it does so the policy holders are not bound to continue to pay their premiums.<sup>4</sup> But where a party failed to pay the premium upon his policy which had become due six months prior to the failure of the company and the appointment of a receiver, it was held that the policy was forfeited.<sup>5</sup>

§ 360. **Where the Company must Give Notice of Maturity of Premium.** — Unless so stipulated in the policy the insurer is not generally bound to give notice of the maturity of a premium where the amount of such premium is fixed by the contract. The fact that before the policy was issued a promise of notice was made is immaterial, such promise not being embodied in the policy,<sup>6</sup> nor will it excuse that

<sup>1</sup> *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567.

<sup>2</sup> *Attorney-General v. Guardian Mut. L. Ins. Co.*, 82 N. Y. 336; *Attorney-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Jones v. Life Assn. of America* (Ky. Ct. Appeals), 7 Ky. L. Rep. 1; 2 S. W. Rep. 447.

<sup>3</sup> *Dorion v. Positive Government, etc., Co.*, 23 Low. Can. Jur. 261. But see *Quinn v. Manhattan L. Ins. Co.*, 28 La. Ann. 135.

<sup>4</sup> *People v. Empire Mut. Ins. Co.*, 92 N. Y. 105; *People v. Security L. etc., Co.*, 78 N. Y. 114; 34 Am. Rep. 522; *Shaw v. Republic L. Ins. Co.*, 49 N. Y. 286.

<sup>5</sup> *Attorney-General v. Continental L. Ins. Co.*, 64 How. Pr. 519.

<sup>6</sup> *Insurance Co. v. Mowry*, 96 U. S. 544.

the company had a usage of giving notice,<sup>1</sup> and where notice is required by law, a substantial compliance is sufficient.<sup>2</sup> The burden is on the company to show such notice.<sup>3</sup> But if it was the general practice of the company to notify the assured of the amount of the premium and the share of the profits to which he, as a member of a mutual company, was entitled to receive under the terms of the contract, and the company had knowledge of the residence of the assured and failed to notify the assured and by reason thereof a premium is not paid when due, the company cannot set up such failure to pay as a defense to the policy.<sup>4</sup> And where the company under such circumstances repudiates the contract and clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender is excused.<sup>5</sup> It is competent for the parties to modify the contract in regard to the payment of premiums or notice and the terms of such modification must be complied with by the insurer.<sup>6</sup> Where the husband procures a policy of insurance on his life payable to his wife or children he will be taken to be their agent for the purpose of receiving notice of the premiums.<sup>7</sup>

**§ 361. Receipt of Premiums after They are Due: Usage.**—Where the insurer has, by a course of dealing,

<sup>1</sup> *Mandego v. Centennial Mut. Assn.*, 64 Ia. 134; *Thompson v. Ins. Co.*, 104 U. S. 252; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177.

<sup>2</sup> *Phelan v. Northwestern Mut. L. Ins. Co.*, 42 Hun, 419.

<sup>3</sup> *Baxter v. Brooklyn L. Ins. Co.*, 44 Hun, 184.

<sup>4</sup> *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Insurance Co. v. Eggleston*, 96 U. S. 572; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304.

<sup>5</sup> *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Attorney-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30.

<sup>6</sup> *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1; *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567.

<sup>7</sup> *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143, reversing 33 Hun, 425; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156.

established a habit of receiving premiums after they are due, it may be held to have waived the provision that time shall be of the essence of the contract and it cannot change this course of dealing without notice to the assured.<sup>1</sup> If the habit has been to receive the overdue premiums conditionally, as upon the insured being in good health, the company will not be bound by a tender, after the premium is due, unless the insured is in health;<sup>2</sup> but being in good health only means the general understanding of the parties as to the usual health of the assured.<sup>3</sup> An unauthorized agent cannot add new conditions to those customary to be imposed by the company upon receiving overdue premiums.<sup>4</sup> The premium, however, must be paid within a reasonable time after it is due, even though prompt payment is waived.<sup>5</sup>

§ 362. **Company Must not Mislead Assured.** — Forfeitures are odious and will only be enforced where there is the clearest evidence that that was the intention of the parties. If, therefore, the company so deals with the assured as to induce a belief that the forfeiture will not be exacted in case of a dereliction of payment at the day and so puts him off his guard, it will not be permitted to take advantage of a default which it has itself encouraged. “In transactions of this nature,” says the Supreme Court of Pennsylvania,<sup>6</sup> “it is easy to mislead by a pretense of lib-

<sup>1</sup> *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247; *Ala. Gold Life Ins. Co. v. Garmany*, 74 Ga. 51; *Phoenix Mut. L. Ins. Co. v. Hinesley*, 75 Ind. 1; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; *Thompson v. St. Louis Mut. L. Ins. Co.*, 52 Mo. 469; *post*, § 362.

<sup>2</sup> *Mut. L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172.

<sup>3</sup> *Campbell v. National L. Ins. Co.*, 24 Up. Can. C. P. 133.

<sup>4</sup> *Cotton States L. Ins. Co. v. Lester*, *supra*.

<sup>5</sup> *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 86 Pa. St. 236; 97 Pa. St. 15; *Bergmann v. St. Louis Mut. L. Ins. Co.*, 2 Mo. App. 262; *Leslie v. Knickerbocker L. Ins. Co.*, 63 N. Y. 27.

<sup>6</sup> *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107.

erality, if followed by entire strictness in practice, and the only cure for this is the inquiry by the jury whether the party has been misled by the former. If so, it is a fraud upon the party's rights, which ought to be condemned and redressed."<sup>1</sup> Thus, where the company was in the habit of receiving overdue premiums and sent out letters with the words, "Every policy is non-forfeiting," printed prominently thereon, it was held that these facts were sufficient to prevent the company from insisting upon forfeiture for non-payment of premium.<sup>2</sup> And so where the insured was misled by a duly authorized agent of the company as to the day of payment, the non-payment of the premium in consequence of such information cannot be set up to avoid the policy.<sup>3</sup> A clerk, employed in the office of the general agent of the company, who collected premiums and took risks, and had given the insured receipts for the payment of former premiums, countersigned by the general agent, is, it has been held, clothed with the insignia of agency and the insured may rely upon his agreement that personal demand should be made for future payments.<sup>4</sup> And so of a person at the cashier's desk in the office of the company, who promised that notice should be given.<sup>5</sup> And where the secretary of a mutual company retained the money sent in payment of overdue assessments and dues, without notifying the insured whether the amount of the remittance was satisfactory or not, such action is a waiver of the default.<sup>6</sup>

<sup>1</sup> *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Ruse v. Ins. Co.*, 26 Barb. 556; *Union Central L. Ins. Co. v. Pottker*, 33 Ohio St. 459; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276; *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; *Bergmann v. St. Louis L. Ins. Co.*, 2 Mo. App. 262; *O'Reilly v. Guardian Mut. L. Ins. Co.*, 1 Hun, 460; *Brooklyn L. Ins. Co. v. Bledstone*, 25 Ala. 538; *McCorkle v. Texas Ben. Assn (Tex.)*, 8 S. W. Rep. 516.

<sup>2</sup> *Home L. Ins. Co. v. Pierce*, 75 Ill. 426.

<sup>3</sup> *Selvage v. John Hancock, etc., Ins. Co.*, 12 Fed. Rep. 603.

<sup>4</sup> *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304.

<sup>5</sup> *Leslie v. Knickerbocker L. Ins. Co.*, 63 N. Y. 27.

<sup>6</sup> *Georgia Masonic, etc., Co. v. Gibson*, 52 Ga. 640.

And the company cannot set up a default as a forfeiture if it was caused by the fraud of its agent intrusted with general authority or authority to collect.<sup>1</sup> In such cases, where the conduct of the company has been misleading, the ordinary principles of estoppel apply and preclude the company from setting up the forfeiture.<sup>2</sup>

§ 363. **Effect of Prospectus.** — It has been held in England that a prospectus, issued by the company at the time of making the policy, setting forth that policies will be indisputable except for fraud, becomes a part of the contract, as a representation, that the assured can avail himself of in equity.<sup>3</sup> But in this country the doctrine is doubted. In *Ruse v. Mut. L. Ins. Co.*,<sup>4</sup> the New York Court of Appeals held that a prospectus, issued by a life insurance company, stating that a party neglecting to settle his annual premiums within thirty days after it is due forfeits his interest in his policy, was inadmissible to vary an express provision in the policy, that a failure to pay the premiums promptly would vitiate it. But on a motion for a rehearing the court intimated that it might reconsider the question if necessary, but deemed it unnecessary in that particular case.<sup>5</sup> In Georgia, in a case involving the same question, the Supreme Court held<sup>6</sup> the same as the New York Court of Appeals.<sup>7</sup>

<sup>1</sup> *McLean v. Piedmont & Arlington L. Ins. Co.*, 29 Gratt. 361; *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203.

<sup>2</sup> *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220; *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Horn v. Cole*, 51 N. H. 287; *Insurance Co. v. Wolff*, 95 U. S. 326.

<sup>3</sup> *Collett v. Morrison*, 9 Hare, 162; *Wood v. Dwarrris*, 11 Exch. 493; *Wheelton v. Hardisty*, 92 E. C. L. 231; 8 El. & Bl. 232; *Central Ry. Co. v. Kisch*, 2 H. L. Cas. 99; *Salvin v. James*, 6 East, 571.

\* 23 N. Y. 516.

<sup>5</sup> *Ruse v. Mut. L. Ins. Co.*, 24 N. Y. 653.

<sup>6</sup> *Mutual Ben. L. Ins. Co. v. Ruse*, 8 Ga. 534.

<sup>7</sup> 23 N. Y. 516, *supra*.

**364. Refusal to Receive Premiums.** — Where the insurer refuses to receive the premium when tendered, basing the refusal on the unfounded claim that the policy has been forfeited, a suit in equity is maintainable to have the policy declared existing and in force. As where plaintiff had a policy which by its terms was forfeited by a failure to pay a premium when due: plaintiff was entitled to a dividend to be applied to the premium and, in consequence of the course of dealing, had no knowledge of the exact amount to be paid until advised by the company, which was accustomed to send, in advance of the time of payment, a statement of the amount due. Plaintiff, not having received the statement, wrote for it and sent the amount he supposed would be required. The letter was received by the company in sufficient time to have notified plaintiff so that he could have paid on the day; three months afterwards the company answered that the policy was cancelled and returned the money; afterwards plaintiff tendered the premium, which was refused. On these facts it was held that the company could not claim the forfeiture.<sup>1</sup> There is no forfeiture where the insured offers, at the date of the maturity of the premium, to pay it to the insurer's agent, who refuses to receive it on the ground that he has not received the receipts for the same from the home office.<sup>2</sup> Where, however, the company refused to receive the premium unless an increased amount was paid, because the insured was residing south and the agent of the insured said that he would decide next day, at which time he tendered the premium and the additional amount, which were refused, it was held that, as there was no agreement to pay the increased amount on the part of the insured the promise of the company to receive it was without consideration and

<sup>1</sup> *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516, affirming 51 How. Pr. 263; *Hayner v. American Popular L. Ins. Co.*, 69 N. Y. 435.

<sup>2</sup> *Kantrener v. Penn. Mut. L. Ins. Co.*, 5 Mo. App. 581; *Shear v. Mut. L. Ins. Co.*, 4 Hun, 800.



not binding.<sup>1</sup> After one refusal to accept the premium the insured is not bound to make formal tenders of subsequent premiums on each pay-day.<sup>2</sup>

§ 365. **Dividends: Mutual Accounts.** — Where a mutual insurance company has in its hands dividends belonging to a policy-holder more than sufficient to pay an accruing premium when it falls due, the company is bound, if the premium is not paid, to make such an appropriation and cannot declare the policy forfeited for failure to pay the premium in question. Especially is this so where the insured had been in the habit of applying his dividends to the payment of premiums.<sup>3</sup> But the dividends must be sufficient to pay the premium.<sup>4</sup> If there are mutual accounts between the insurer and insured, charging the premium to the latter is payment.<sup>5</sup> But a mere indebtedness of a small amount by the company to the insured for services will not excuse the non-payment of premium, no usage to the contrary being shown.<sup>6</sup> And if the policy provides how dividends shall be appropriated that will govern.<sup>7</sup>

§ 366. **Credit for Premiums.** — Credit for a premium may be given by a duly authorized agent, either with or without delivery of the receipt therefor, and in such case the rights of the insured will not be affected by the non-payment.<sup>8</sup> This is especially the case if credit is given by

<sup>1</sup> *Evans v. United States L. Ins. Co.*, 64 N. Y. 304.

<sup>2</sup> *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; *Shaw v. Republic Ins. Co.*, 69 N. Y. 286; *Hayner v. Popular Ins. Co.*, *Id.* 435.

<sup>3</sup> *Girard, etc., Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Brooks v. Phoenix Mut. L. Ins. Co.*, 16 Blatchf. 182; *Chicago L. Ins. Co. v. Warner*, 80 Ill. 410.

<sup>4</sup> *Bulger v. Washington L. Ins. Co.*, 63 Ga. 328.

<sup>5</sup> *Butler v. Am. Popular L. Ins. Co.*, 10 Jones & Sp. 342.

<sup>6</sup> *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300.

<sup>7</sup> *Hull v. Northwestern Ins. Co.*, 39 Wis. 397.

<sup>8</sup> *Homer v. Guardian Mut. L. Ins. Co.*, 67 N. Y. 478; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; *Tennant v. Travelers' Ins. Co.*, 31 Fed.

an agent with the knowledge of the company,<sup>1</sup> and the charging up the premium to the account of the insured by the general agent will be deemed a credit.<sup>2</sup> But when the insured is permitted to make the payment of the premium in thrice yearly installments, the payment of the first will not be taken to give him credit for the second and third payments to the end of the year.<sup>3</sup> The fact that the company once allowed credit does not warrant the inference of a custom to that effect.<sup>4</sup> The indorsement of an extension on the premium notice has no implied condition that the insured shall be living at the time the credit matures.<sup>5</sup>

§ 367. **Payment to Agent.** — An agent of a life insurance company, intrusted with receipts for premiums may, by a custom of receiving premiums after they are due, as, for example by giving credit until the first of the next month or by their mere receipt after due, bind his company so that it cannot insist upon a forfeiture for the non-payment.<sup>6</sup> Money advanced by a sub-agent to a general agent may be held to be an advance on account of premiums expected to be collected, including one on the life of the sub-agent for the benefit of his wife.<sup>7</sup> A mere clerk in the office of the company cannot, by receipt of overdue pre-

Rep. 322; Lebanon Mut. Ins. Co. v. Hoover, 18 W. N. C. 223; Heaton v. Manhattan F. Ins. Co., 7 R. I. 502; Church v. LaFayette F. Ins. Co., 66 N. Y. 222; Societe, etc., v. Morris, 24 La. Ann. 347.

<sup>1</sup> Insurance Co. v. Colt, 20 Wall. 560; Miller v. Life Ins. Co., 12 Wall-285; Matter of Booth, 11 Abb. N. C. 145.

<sup>2</sup> People v. Globe Mut. L. Ins. Co., 65 How. Pr. 239.

<sup>3</sup> Howard v. Continental L. Ins. Co., 48 Cal. 229.

<sup>4</sup> Willcuts v. Northwestern Mut. L. Ins. Co., 81 Ind. 300.

<sup>5</sup> Homer v. Guardian Mut. L. Ins. Co., 67 N. Y. 478.

<sup>6</sup> Mound City Mut. L. Ins. Co. v. Twining, 19 Kan. 349; Ins. Co. v. Norton, 96 U. S. 234; Ins. Co. v. Wolff, 95 U. S. 326; Unsell v. Hartford L. & A. Ins. Co., 32 Fed. Rep. 443; Piedmont & Arlington L. Ins. Co. v. McLean, 31 Gratt. 517; Same v. Lester, 59 Ga. 812; American L. Ins. Co. v. Green, 57 Ga. 469. But see Brown v. Mass. M. L. Ins. Co., 59 N. H. 298.

<sup>7</sup> Thompson v. American Tontine, etc., Ins. Co., 46 N. Y. 674.

miums, bind his company so that the forfeiture will be waived.<sup>1</sup> Where the assured had been in the habit of paying the annual premium to the local agent of the company, and such payments have been accepted by the latter without objection, although the policy provided for payment at the principal office of the company, a tender of the annual premium to such agent is sufficient to prevent forfeiture.<sup>2</sup> But where the policy contained an express provision that any alteration or waiver of its conditions "unless made at the head office, and signed by an officer of said company, shall not be considered as valid," it was held by the Court of Appeals of New York<sup>3</sup> that, even admitting that a general agent ordinarily might waive forfeitures or conditions, he would have no such power, if his authority was thus curtailed and limited by an express provision in the policy itself, thus brought to the knowledge of the assured.<sup>4</sup> But it must be remembered that outside of all questions as to the authority of agents to receive premiums after they are due, so as to waive a forfeiture, there may be the question of custom, and whether the company by its agent so misled the assured as to create an estoppel.<sup>5</sup> One who has paid his premiums to an agent will be protected, if, without notice that the agent's authority has been revoked, he pays his premium in due time to such agent.<sup>6</sup> In cases where the agent, formerly intrusted with the collection of premiums, has been changed, the company must notify the policy holders thereof.<sup>7</sup> If no notice has been given of a change of agents the insured has a reasonable time to find

<sup>1</sup> *Koelges v. Guardian L. Ins. Co.*, 2 Lans. 480.

<sup>2</sup> *Morey v. New York L. Ins. Co.*, 2 Woods, 663.

<sup>3</sup> *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278.

<sup>4</sup> *Insurance Co. v. Wilkenson*, 13 Wall. 222; *Insurance Co. v. Fletcher*, 117 U. S. 519.

<sup>5</sup> *Post*, §§ 432, 433.

<sup>6</sup> *McNeilly v. Continental L. Ins. Co.*, 66 N. Y. 23; *Seamans v. N. W. Mut. L. Ins. Co.*, 1 McC. 508; 3 Fed. Rep. 325.

<sup>7</sup> *Briggs v. National L. Ins. Co.*, 11 Fed. Rep. 458.

the new agent.<sup>1</sup> And where, after diligent inquiry, the insured could not find the new agent, and sixty days after the premium was due tendered it to the former agent, it was held that the delay was not unreasonable and that there was no forfeiture.<sup>2</sup> Where the company discontinued its agency at the place of the residence of the assured, and thereafter notified him from time to time where to pay, but the insured did not received the notice of one premium and did not find out where the receipt was until nearly sixty days later, when he made a tender, which the agent refused to receive unless a certificate of health was furnished, which was not done, and the assured died a few days later, it was held that there was no forfeiture.<sup>3</sup> In this case the court says: "The business of life insurance is in the hands of a few large companies, who are generally located in our large commercial cities. Take a company, located, like the plaintiff in error, in New York, for example. It solicits business in every State of the Union, where it is represented by its agents, who issue policies and receive premiums. Could such a company get one risk where it now gets ten, if it was expected or understood that it was not to have local agents accessible to the parties insured, to whom premiums could be paid instead of having to pay them at the home office in New York? The universal practice is otherwise. Local agents are employed. The business could not be conducted on its present basis without them. Now, suppose the local agent is removed, or ceases to act, without the knowledge of the policy holders, and their premiums become due, and they go the local office to pay them, and find no agent to receive them; are these policies to be forfeited? Would the plaintiff in error, or any other company in good standing, have the courage to

<sup>1</sup> *Seamans v. N. W. Mut. L. Ins. Co., supra.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Insurance Co. v. Eggleston*, 96 U. S. 572.

say so? We think not. And why not? Simply because the policy holders would have the right to rely on the general understanding produced by the previous course of business pursued by the company itself, that payment could be made to a local agent, and that the company would have such an agent at hand, or reasonably accessible. We do not say that this course of business would alter the written contract, or would amount to a new contract relieving the parties from their obligation to pay the premium to the company, if they can find no agent to pay to. That obligation remains. But we are dealing with the question of forfeiture for not paying at the very day; and, in reference to that question, it is a good argument in the mouths of the insured to say: 'Your course of business led us to believe that we might pay our premiums at home, and estops you from exacting the penalty of forfeiture without giving us reasonable notice to pay elsewhere.' The course of business would not prevent the company, if it saw fit, from discontinuing all its agencies, and requiring the payment of premiums at its counter in New York. But, without giving reasonable notice of such a change, it could not insist upon a forfeiture of the policies for want of prompt payment caused by their failure to give such notice. \* \* \*

In the present case, it seems to us that the charge of the judge was in substantial conformity to the principles we have laid down. The insured, residing in the State of Mississippi, had always dealt with agents of the company located either in his own State or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such an agent; and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held, that, under these circumstances, he had reasonable cause to rely on having such notice. The com-

pany itself did not expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of this fact; — at least such was the finding of the jury from the evidence.”

**§ 368. Where the Day of Payment Falls on Sunday. —** If the day appointed for the payment of premium fall on Sunday the payment is in time if made on Monday, even though a loss occur on Sunday afternoon, and the policy provide that it shall be void if the premium be not paid before noon of the day fixed.<sup>1</sup> This rule applies to notes given for premiums.<sup>2</sup> But the Court of Appeals of Kentucky has held that because the day on which payment is to be made is Thanksgiving the insured is not excused from paying, because the statute of that State which provides that Thanksgiving day shall be treated as Sunday in regard to the presentment, acceptance and protesting of notes and bills does not apply to other business transactions or contracts.<sup>3</sup>

**§ 369. Premium Need not Always be Paid in Money: What Amounts to Payment. —** Unless otherwise provided for by the contract the payment of a premium may be in any mode, services, checks, or even depreciated funds, that may be accepted without objection by the insurers or their agents. Payment by check which was dishonored has been held good,<sup>4</sup> but not if the policy provides otherwise.<sup>5</sup> A

<sup>1</sup> *Hammond v. American Mut. Life Ins. Co.*, 10 Gray, 306; *Howland v. Continental Life Ins. Co.*, 121 Mass. 499; *Taylor v. Germania Ins. Co.*, 2 Dill. 282; *Campbell v. International Life Ass. Soc.*, 4 Bosw. 298. In this latter case is a learned review of all cases bearing upon the lawfulness of Sunday acts.

<sup>2</sup> *Leigh v. Knickerbocker Life Ins. Co.*, 26 La. Ann. 436.

<sup>3</sup> *National Mut. Ben. Assn. v. Miller*, 2 S. W. Rep. 900; 8 Ky. L. Rep. 731.

<sup>4</sup> *Ætna Life Ins. Co. v. Green*, 38 Up. Can. Q. B. 459.

<sup>5</sup> *Neill v. Union Mut. Life Ins. Co.*, 45 Up. Can. Q. B. 593; affirmed 7 Ont. App. 171.

general agent may accept a note,<sup>1</sup> and even though it be unpaid the policy is not forfeited,<sup>2</sup> and so with an order upon a third party; if the company wishes to insist upon a non-forfeiture in consequence of its non-payment, it must give timely notice.<sup>3</sup> If a receipt stipulate that if the draft, accepted in payment of the premium, be not paid the receipt shall be of no effect, the policy will lapse if the draft is unpaid.<sup>4</sup> And if there are mutual accounts between the parties, charging the premium to the insured is payment.<sup>5</sup> And where the agent, who had dealings with the firm of the assured, told him that he had taken care of the premium, this was held to be payment.<sup>6</sup> Where the insured, in pursuance of instructions from the company, delivers the amount of the premium to an express company, the premium is paid from the time of such delivery.<sup>7</sup> Part payment of a premium will not keep a policy in force *pro tanto*;<sup>8</sup> nor is a cash payment and notes for the deferred quarterly premiums payment if the notes be not paid;<sup>9</sup> nor writing a letter with the money enclosed, if it be not delivered to an express company, when the insured was instructed to pay to the express company;<sup>10</sup> nor a payment

<sup>1</sup> New York Life Ins. Co. v. McGowan, 18 Kan. 300; Mississippi Valley Life Ins. Co. v. Neyland, 9 Bush, 430.

<sup>2</sup> Southern Life Ins. Co. v. Booker, 9 Heisk. 606.

<sup>3</sup> National Benefit Assn. v. Jackson, 114 Ill. 533; Lyon v. Travelers' Ins. Co., 55 Mich. 141.

<sup>4</sup> Life Insurance Co. v. Pendleton, 112 U. S. 696; 115 U. S. 339.

<sup>5</sup> Continental Life Ins. Co. v. Ashcraft, 18 W. N. C. 97; Marsh v. Northwestern Nat. Ins. Co., 3 Biss. 351; Butler v. Am. Popular Life Ins. Co., 10 Jones & S. 342. But see Wright v. Equitable Life Ins. Co., 9 Jones & S. 1.

<sup>6</sup> Chickering v. Globe Mut. Life Ins. Co., 116 Mass. 321.

<sup>7</sup> Currier v. Ins. Co., 53 N. H. 538; Whitley v. Piedmont & Arlington Ins. Co., 71 N. C. 480.

<sup>8</sup> Hudson v. Knickerbocker Life Ins. Co., 28 N. J. Eq. 167; Willcuts v. Northwestern Mut. Life Ins. Co., 81 Ind. 300.

<sup>9</sup> Werner v. Metropolitan Life Ins. Co., 11 Daly, 176; Howard v. Continental Life Ins. Co., 48 Cal. 229.

<sup>10</sup> Donald v. Life Ins. Co., 4 S. C. 321.

in other than money to an agent under circumstances amounting to fraud upon the insurer.<sup>1</sup> But ordinarily, the payment is good if the agent receive the equivalent offered, be it even depreciated funds,<sup>2</sup> or note.<sup>3</sup> Unless otherwise provided payments of premiums are to be made at the domicile of the company.<sup>4</sup>

§ 370. **Payment of Premium after Death of Insured : Days of Grace.** — It has been held that, if the insured has been led to believe that prompt payment of premiums will not be insisted upon, payment can be made of a premium after it is due and even though the insured may be dead.<sup>5</sup> Where by the terms of the policy, the premium was due at a certain time or within thirty days thereafter, payment can be made during the thirty days although the insured is dead.<sup>6</sup> A policy will not be forfeited for mere non-payment of assessments, if paid after the death of the insured in pursuance of a request made by him when alive, which assessments, are retained by the insurer until after suit brought.<sup>7</sup> If the overdue premium be paid after the death of the insured, under circumstances which make it a fraud on the company, it will not be liable; as where, after the insured had on demand refused to pay the premium and a few days afterwards died, a friend paid the amount to the company, which, not knowing of the death, accepted it.<sup>8</sup>

<sup>1</sup> Hoffman v. John Hancock Life Ins. Co., 92 U. S. 161.

<sup>2</sup> Sands v. New York Life Ins. Co., 50 N. Y. 626; New York Life Ins. Co. v. Clopton, 7 Bush, 179.

<sup>3</sup> Mut. Ben. Life Ins. Co. v. French, 30 Ohio St. 240; Pitt v. Berkshire Life Ins. Co., 100 Mass. 500; Mowry v. Home Ins. Co., 9 R. I. 346; Moffatt v. Reliance Mut. Life Ins. Soc., 45 Up. Can. Q. B. 561.

<sup>4</sup> Insurance Co. v. Davis, 95 U. S. 425.

<sup>5</sup> Mayer v. Mut. L. Ins. Co., 38 Ia. 304; Froelich v. Atlas L. Ins. Co., 47 Mo. 406. In this case the money was received without objection by the company.

<sup>6</sup> Rogers v. Capitol L. Ins. Co., 1 W. N. C. 589.

<sup>7</sup> Erdmann v. Mut. Ins. Co., etc., 44 Wis. 376.

<sup>8</sup> Miller v. Union Cent. L. Ins. Co., 110 Ill. 102.



But it has been said that, where days of grace are given, after the premium is due, for its payment, if the insured wishes to take advantage of the delay he must do so at his own risk. If he dies, therefore, within the period of grace with the premium unpaid the policy is gone. This is the reason that the right to make the payment is personal in such cases and cannot be delegated and closes with the death of the insured. In practice, however it is seldom that the delay granted is considered a period of grace and where it has been so held some special wording of the policy justified it. A distinction is made between mere days of grace and an extension of the time of payment, or a time allowed by the contract for the payment, as where the premium was to be paid at a certain time or thirty days thereafter; in the latter case payment can be made during any part of the period although a loss has meantime happened.<sup>1</sup>

**§ 371. When Note is Taken for Premium.** — If an insurance company takes a note for the premium when it falls due, and gives therefor renewal receipts, the transaction evidences a loan of money, and, unless otherwise stipulated in the policy, the policy continues in force, though the note be not paid, and the company cannot afterwards insist on its forfeiture. This is especially the case if the note of some other person than the assured be taken.<sup>2</sup>

<sup>1</sup> *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 277; *Pritchard v. Merchants', etc., Soc.*, 3 C. B. (N. S.) 622; *Simpson v. Accidental Death Ins. Co.*, 2 C. B. (N. S.) 257; *Robert v. New England, etc., Ins. Co.*, 1 Disney, 355; *McDonnell v. Carr*, 1 Hayes & Jones Irish R. 256. And see *Worden v. Guardian, etc., Ins. Co.*, 7 Jones & Sp. 317, where the distinction mentioned in the text is made. In *Want v. Blunt*, 12 East, 183, the policy provided that the payments should be made at certain times "during the life" of the insured. Construing this it was held that the insured must be living at the time of the payment.

<sup>2</sup> *Michigan Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Tabor v. Mich. Mut. L. Ins. Co.*, 44 Mich. 324; *Franklin L. Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504; *Mut. Ben. Insur-*

Where, however, the policy provides that if a note or check received for any premium be not paid the policy shall be forfeited, the insurance falls if the paper be not paid, and the company is not bound to give notice of the maturity of such paper.<sup>1</sup> Nor, unless so agreed, is the company bound to return the note.<sup>2</sup> An interesting case was decided in the United States Circuit Court for Vermont, the facts being as follows:<sup>3</sup> A mutual life insurance company insured, by an endowment policy, the life of a husband for the sole benefit of his wife, in an amount payable to her on a day named. For four years the company accepted the notes of the husband as payment of one-half of the annual premiums, the notes being given on the representation by the company that they would be paid by dividends and pledging the policy and all payments that might become due thereon, to the company for the payment of such notes. In a suit by the husband and wife, in right of the wife, against the company to recover the amount insured, the plaintiffs claimed that the dividends declared, if credited on the notes, would pay them in full; the defendant, however, claimed, that the amount due on the policy was the sum insured, less the amount due on the notes. The court held that the notes were not binding on the wife and were not to be deducted from the policy, she never having done anything to qualify her right to it.

*ance Co. v. French*, 30 Ohio St. 240; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286; *Tutt v. Covenant L. Ins. Co.*, 19 Mo. App. 677; *Timayenis v. Union Mut. L. Ins. Co.*, 21 Fed. Rep. 223; *Trager v. Louisiana Equitable L. Ins. Co.*, 31 La. Ann. 235. But see *St. Louis Mut. L. Ins. Co. v. Grigsby*, 10 Bush, 310.

<sup>1</sup> *Thompson v. Insurance Co.*, 104 U. S. 252, affirming 2 Woods, 547; *Neill v. Union Mut. L. Ins. Co.*, 45 Upp. Can. Q. B. 593; *Gorton v. Dodge Co., etc. Ins. Co.*, 39 Wis. 121.

<sup>2</sup> *Deppe v. Southern Mut. L. Ins. Co.*, 8 Ky. L. Rep. 57; *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 160; *How v. Mutual L. Ins. Co.*, 80 N. Y. 32.

<sup>3</sup> *Brooks v. Phoenix Mut. L. Ins. Co.*, 16 Blatchf. 182.

**§ 372. The Same Subject: Premium Notes Proper. —**

In many companies part of the premium is regularly paid by what is called premium notes. The policy itself generally provides as to these, and if it does the agreement of the parties prevails. A premium note is not delivered while held by a third party to whom it was given to carry to the agent.<sup>1</sup> If the policy provides that if a premium note be not paid at maturity the policy shall be void, non-payment of such note forfeits the policy.<sup>2</sup> But such agreement must be clearly expressed or it will not be enforced.<sup>3</sup> It is unnecessary to make demand for the payment of a premium note, unless so provided in the contract.<sup>4</sup> If the company receives money on an overdue premium note from an agent without inquiry the forfeiture is saved.<sup>5</sup> In contracts of life insurance the time for the payment of interest on premium notes is of the very essence of the contract; and if, by the terms of the policy, it is to become void upon a failure to pay such interest at the time specified, non-payment of interest works a forfeiture against which equity will not relieve.<sup>6</sup> Such a provision is not usurious nor unconscionable.<sup>7</sup> A condition, however, that non-payment of interest

<sup>1</sup> *Brown v. Ins. Co.*, 59 N. H. 298.

<sup>2</sup> *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283; *Kerns v. New Jersey M. L. Ins. Co.*, 86 Pa. St. 171; *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32; *Sanderson v. New England L. Ins. Co.*, 1 Disn. 355; *McAllister v. New England M. L. Ins. Co.*, 101 Mass. 558; *Bane v. Travelers' Ins. Co.*, 7 Ky. L. Rep. 750.

<sup>3</sup> *New England Mut. L. Ins. Co. v. Hasbrook*, 32 Ind. 447; *Cowles v. Insurance Co.*, 63 N. H. 300; *Kansas Prot. Union v. Whitt* (Kan.), 14 Pac. Rep. 275.

<sup>4</sup> *Roehner v. Knickerbocker L. Ins. Co.*, 63 N. Y. 160; 4 Daly, 512; *Deppe v. Southern Mut. L. Ins. Co.*, 8 Ky. L. Rep. 57.

<sup>5</sup> *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144.

<sup>6</sup> *Knickerbocker L. Ins. Co. v. Dietz*, 52 Md. 16; *Patch v. Phoenix M. L. Ins. Co.*, 44 Vt. 481; *Knickerbocker L. Ins. Co. v. Harlan*, 56 Miss. 512; *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flip. 559.

<sup>7</sup> *Attorney-General v. North American L. Ins. Co.*, 82 N. Y. 172; *Insurance Co. v. Robinson*, 40 Ohio St. 270; *Russum v. St. L. Mut. L. Ins. Co.*, 1 Mo. App. 228; *Nettleton v. St. Louis L. Ins. Co.*, 7 Biss. 293, where

on a premium note shall forfeit the policy cannot be inserted in a paid-up policy given in exchange for another, if the terms of the original policy do not warrant it.<sup>1</sup> And non-payment of interest will not be cause of forfeiture unless so stipulated.<sup>2</sup> Where dividends are due the assured they should be applied first to the payment of interest on the premium note and then to the principal,<sup>3</sup> unless there has been a well defined custom to the contrary.<sup>4</sup> Where the premium notes were considered as loans by the company it was held by the Supreme Court of Vermont, in construing the policy, that non-payment of interest on such notes did not cause a forfeiture although it was apparently so provided in the policy.<sup>5</sup> Where the policy provided for forfeiture if interest on the premium notes was not paid, and by indorsement the policy was made paid-up for a certain amount, it was held that the proviso continued and the policy was made void by the non-payment of interest on the premium notes.<sup>6</sup> And so where a new policy was taken containing the provision of forfeiture for non-payment of interest on the premium note.<sup>7</sup>

§ 373. **Non-Forfeitable Policies.**— Many policies are called “non-forfeitable” although, by their terms, so

it is suggested that there may be cases where equity would relieve against forfeiture for non-payment of interest. *Smith v. St. L. Mut. L. Ins. Co.*, 2 Tenn. Ch. 727. Opposed to these cases are *St. L. Mut. L. Ins. Co. v. Grigsby*, 10 Bush, 310; *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269; *Cowles v. Continental L. Ins. Co.*, 63 N. H. 300; 1 N. Eng. Rep. 247.

<sup>1</sup> *Cole v. Knickerbocker L. Ins. Co.*, 63 How. Pr. 442.

<sup>2</sup> *Gardner v. Union Central L. Ins. Co.*, 5 Fed. Rep. 430.

<sup>3</sup> *Northwestern Mut. L. Ins. Co. v. Fort*, 82 Ky. 269; *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 727.

<sup>4</sup> *Anderson v. St. Louis Mut. L. Ins. Co.*, 1 Flip. 559.

<sup>5</sup> *Bruce v. Continental L. Ins. Co.*, 58 Vt. 253; 1 N. Eng. Rep. 635; *Insurance Co. v. Bonner*, 36 Ohio St. 51.

<sup>6</sup> *Holman v. Continental L. Ins. Co.*, 54 Conn. 195; 2 N. Eng. Rep. 833, all the previous cases on the subject being here fully reviewed.

<sup>7</sup> *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480.

many conditions and limitations are imposed, that the word means little except that they are either subject to the Massachusetts law, of which we shall soon speak, or that, after a certain number of premiums are paid, they may be exchanged for paid-up policies or become paid up by their own terms for a certain percentage of the original amount. The questions arising out of these policies are chiefly those of construction, and the adjudications upon these questions are individual, rather than upon general principles. Where a new policy, issued on receipt and surrender of the old one, conforms to the terms of the old in respect to forfeiture for non-payment of interest on a premium note, this provision will be upheld.<sup>1</sup> And no notice of the time when such interest is due will be given.<sup>2</sup> Where the policy provides that a certain number of "complete annual premiums" must be paid to entitle the policy to be exchanged, payment of the premium notes given for a portion of the premium has been held unnecessary, to bring the payment of the premium within the term.<sup>3</sup> Under the provisions of a policy of this kind, where it was provided that upon default in the payment of any annual premium it could be exchanged for a paid-up policy, for as many tenths as there had been annual premiums paid, it was held that the premium notes could not be deducted from the amount of the new policy.<sup>4</sup> Whether the old policy must be surrendered or not, to obtain the benefit of the provision in a non-

<sup>1</sup> *People v. Knickerbocker L. Ins. Co.*, 103 N. Y. 480; 9 N. East. Rep. 35; 4 Cent. Rep. 783; *Holman v. Continental L. Ins. Co.*, 54 Conn. 195; *Moser v. Phoenix M. L. Ins. Co.*, 2 Mo. App. 408; *Ewald v. Northwestern Mut. L. Ins. Co.*, 60 Wis. 431; *Russum v. St. L. Mut. L. Ins. Co.*, 1 Mo. App. 228.

<sup>2</sup> *Heim v. Metropolitan L. Ins. Co.*, 7 Daly, 536.

<sup>3</sup> *Ohde v. Northwestern Mut. L. Ins. Co.*, 40 Ia. 357.

<sup>4</sup> *Dutcher v. Brooklyn L. Ins. Co.*, U. S. Cir. Ct. E. D. Mo., 3 Dill. 87; 4 Ins. L. J. 812; affirmed, *Ins. Co. v. Dutcher*, 95 U. S. 269. But the unpaid premium notes would be a lien on the new policy. See also *Ohde v. Northwestern L. Ins. Co.*, 40 Ia. 357.

forfeiting policy, which provides that, upon default in the payment of any premium, it may be surrendered, and a new one for a specified proportional part issued, within the prescribed time mentioned in the old, depends upon the wording of the contract. In one case,<sup>1</sup> it was held that such a surrender within twelve months was unnecessary, but there the language of the policy was not clear. In a later case in the same State<sup>2</sup> it was held that a surrender within the limited twelve months was unnecessary, if the insured died during such period.<sup>3</sup> Where, by a separate instrument, the company agreed, after the payment of three annual premiums, to issue a paid-up policy for a proportionate amount on surrender of the policy, "on or before it shall expire by the non-payment of the fourth or any subsequent premium," it was held that the word "on" should be construed to mean the instant of the expiration of the policy and that time was of the essence of the contract and the assured was not entitled to a paid-up policy on the surrender of the original policy after it had expired.<sup>4</sup> And generally the right to demand a paid-up policy must be exercised within the time prescribed or it will be lost.<sup>5</sup> The conditions of the old policy apply to the new or the

<sup>1</sup> *Chase v. Phoenix Mut. L. Ins. Co.*, 67 Me. 85.

<sup>2</sup> *Dorr v. Phoenix M. L. Ins. Co.*, 67 Me. 438.

<sup>3</sup> *Wheeler v. Conn. Mut. L. Ins. Co.*, 82 N. Y. 543, reversing 16 Hun, 317.

<sup>4</sup> *Sheerer v. Manhattan L. Ins. Co.*, 20 Fed. Rep. 886; 16 Fed. Rep. 720; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177; *People v. Widows*, etc., *Ins. Co.*, 15 Hun, 8; *Phoenix Mut. L. Ins. Co. v. Baker*, 85 Ill. 410; *Koehler v. Phoenix Mut. L. Ins. Co.*, 4 Ky. L. Rep. 903.

<sup>5</sup> *Hudson v. Knickerbocker L. Ins. Co.*, 28 N. J. Eq. 167; *Attorney-General v. Continental L. Ins. Co.*, 93 N. Y. 70; *Universal L. Ins. Co. v. Whitehead*, 58 Miss. 226; *Hanthorne v. Brooklyn L. Ins. Co.*, 5 Mo. App. 73; *Bussing v. Union Mut. L. Ins. Co.*, 34 Ohio St. 222. But see *Southern Mut. L. Ins. Co. v. Montague*, 2 S. W. Rep. 443; 8 Ky. L. Rep. 579; *Germania L. Ins. Co. v. Saur*, 7 Ky. L. Rep. 297; *Coffey v. Universal L. Ins. Co.*, 10 Biss. 354; 7 Fed. Rep. 301; *Montgomery v. Phoenix Mut. L. Ins. Co.*, 14 Bush, 51.

commuted portion.<sup>1</sup> If there are no words of restriction, as to time of application therefor, then the assured is entitled to a paid-up policy at any time he may ask for it.<sup>2</sup> A contract for a paid-up policy may be specially enforced.<sup>3</sup> But unless the company has bound itself to issue a paid-up policy it is under no obligation to do so.<sup>4</sup>

§ 374. **The Massachusetts Non-Forfeiture Law.**—A question has often arisen under what is known as the Massachusetts non-forfeitable law as to what is the indebtedness which is to be deducted from the net reserve of the policy. This law,<sup>5</sup> which has been adopted in many of the

<sup>1</sup> *Merritt v. Cotton States Ins. Co.*, 55 Ga. 103.

<sup>2</sup> *Christy v. Homeopathic M. L. Ins. Co.*, 93 N. Y. 345; *Lovell v. St. L. Mut. L. Ins. Co.*, 111 U. S. 264.

<sup>3</sup> *Standley v. Northwestern Mut. L. Ins. Co.*, 95 Ind. 254; *Farley v. Union Mut. L. Ins. Co.*, 41 Hun, 303; *Missouri Valley L. Ins. Co. v. Kelso*, 16 Kan. 481.

<sup>4</sup> *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. App. 469. For other distinctions in regard to paid-up policies, see *Johnson v. Southern Mut. L. Ins. Co.*, 79 Ky. 403; *Hughes v. Piedmont & Arlington L. Ins. Co.*, 55 Ga. 111; *Mut. L. Ins. Co. v. Bratt*, 55 Md. 200; *Symonds v. Northwestern L. Ins. Co.*, 23 Minn. 491; *Fithian v. Same*, 4 Mo. App. 386; *Belt v. Brooklyn L. Ins. Co.*, 12 Mo. App. 100; *White v. Penn. Mut. L. Ins. Co.*, 6 Mo. App. 587; *Mound City, etc., Co. v. Twining*, 19 Kan. 349; 12 *Id.* 475; *Northwestern M. L. Ins. Co. v. Ross*, 63 Ga. 199; *Hull v. Same*, 39 Wis. 397; *Northwestern Mut. L. Ins. Co. v. Little*, 56 Ind. 504; *Holly v. Metropolitan L. Ins. Co.*, 105 N. Y. 437; 11 N. East. Rep. 507; 7 Cent. Rep. 263; *Ins. Co. v. Robinson*, 40 Ohio St. 270; *Knapp v. Homeopathic Mut. L. Ins. Co.*, 117 U. S. 411. In most of the cases referred to the last two sections of the text other points are discussed besides those in support of which they are cited.

<sup>5</sup> St. 1861, Ch. 186. This law was changed in 1880; Laws 1880, Ch. 232, § 6. The original law of 1861 is re-enacted in Stat. 1882, § 159, Ch. 119, as follows:

§ 159. No policy of life insurance issued between the ninth day of May in the year 1861 and the first day of January in the year 1881 by a domestic company shall be forfeited or become void by the non-payment of premium thereon, any further than regards the right of the party insured therein to have it continued in force beyond a certain period, to be determined as follows, to-wit: The net value of the policy, when the premium becomes due and is not paid, shall be ascertained,

States, provides that no policy of life insurance shall be cancelled or become void for non-payment of premium any further than the right of the assured to have it continued in force, by the application of the net reserve on the policy, less any indebtedness to the company or notes given for premiums plus one-fifth of what is left after such deduction, to the purchase, as a single premium, of paid-up insurance for the term which it will cover. If the death of the insured occurs during this term the amount of the policy is to be paid as if no default had been made, less, however, the amount of the premiums forborne with interest. Under this law a policy, terminable by failure "to pay when due any notes or other obligations given for premium," is determined by failure to pay an installment due on a premium note, and such note is to be deducted from the net value of the policy as an indebtedness<sup>1</sup> and so with the unpaid half of an annual premium, payment of which was deferred six months by the terms of a memorandum.<sup>2</sup> But if the unpaid portion of the an-

according to the "combined experience" or "actuaries" rate of mortality, with interest at four per cent per annum. After deducting from such net value any indebtedness to the company, or notes held by the company against the insured, which notes, if given for premium, shall then be cancelled, four-fifths of what remains shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid.

§ 160. If the death of such party occurs within the term of temporary insurance covered by the value of the policy as determined in the preceding section, and if no condition of the insurance other than the payment of premium is violated by the insured, the company shall pay the amount of the policy the same as if there had been no lapse of premium, anything in the policy to the contrary notwithstanding; *provided*, that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease, and that the company may deduct from the amount insured in the policy the amount at six per cent. per annum of the premiums that had been forborne at the time of the death.

<sup>1</sup> Pitt v. Berkshire L. Ins. Co., 100 Mass. 500.

<sup>2</sup> Bigelow v. State Mut. L. Assn., 123 Mass. 113



nual premium is not witnessed by a note or other memorandum it is not an indebtedness to be deducted from the net value of the policy as provided in the statute.<sup>1</sup> The Supreme Court of Louisiana, however, in a case against the same company, came to a conclusion just the reverse.<sup>2</sup> So far as the application of the Massachusetts law to endowment policies is concerned, the Supreme Court of that State has held<sup>3</sup> that the expiration of the time specified is equivalent to the death of the party, and if the insured has not paid the last annual premium, but has survived the term, the policy is payable less the amount of the last premium with interest. The point, made by the company, that the policy was only saved in case of the death of the insured within the life of the policy, under the law, after default in the payment of a premium, was not approved.

**§ 375. Stranger may become Liable for Premium. —**

A stranger may become liable for the payment of premiums on a life insurance policy, as where a society, other than the insuring company, in consideration of weekly dues, promises certain benefits in sickness and to pay for life insurance.<sup>4</sup> An assignee who holds a policy as security for a debt is not bound to pay the annual premiums thereon,<sup>5</sup> unless, of course, he expressly agrees to pay them.

**§ 376. When Company Wrongfully Declares a Forfeiture of the Policy. —** If a company wrongfully declares the policy forfeited and refuses to accept the premium when duly tendered, and to give the insured the customary renewal receipt, evidencing the continued life of the policy, the assured has his choice of three courses: He may tender

<sup>1</sup> Goodwin v. Massachusetts Mut. L. Ins. Co., 73 N. Y. 480.

<sup>2</sup> Van Creelen v. Insurance Co., 35 La. Ann. 226.

<sup>3</sup> Carter v. John Hancock Mut. L. Ins. Co., 127 Mass. 153.

<sup>4</sup> Teutonia L. Ins. Co. v. Anderson, 77 Ill. 334. See also Barker v. North British Ins. Co., 9 Scot. Sess. Cas. 869.

<sup>5</sup> Van Duersen v. Scanlan, 7 Cin. L. Bul. 188.

the premium and wait until the policy becomes payable by its terms and then try the question of forfeiture;<sup>1</sup> or he may sue in equity to have the policy continued in force;<sup>2</sup> or he may elect to consider the policy at an end and bring an action to recover the just value of the policy,<sup>3</sup> in which case the measure of damages is the amount of the premiums paid with interest on each from the time it was made.<sup>4</sup> There is no implied promise in law to receive the premiums upon which an action can be based.<sup>5</sup>

**§ 377. Assessments in Benefit Societies Must be Made in Exact Accordance with Their Laws: Strict Construction.**—In benefit societies the losses are paid from the proceeds of assessments, levied, as required, upon the members by a central or superior authority. The manner of calling these assessments is supposed to be set out in the constitution and by-laws, which also generally provide that if the member does not pay his assessments at the time prescribed, he forfeits all his rights as such member, or is suspended from those rights until such time as he shall be reinstated

<sup>1</sup> Day v. Conn. General L. Ins. Co., 45 Conn. 480.

<sup>2</sup> Meyer v. Knickerbocker L. Ins. Co., 73 N. Y. 516; Ins. Co. v. Tullidge, 39 Ohio St. 240; Hayner v. American Popular L. Ins. Co., 69 N. Y. 435; Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610.

<sup>3</sup> McKee v. Phoenix Mut. L. Ins. Co., 28 Mo. 383; Union Cent. L. Ins. Co. v. Pottker, 33 Ohio St. 459; Helme v. Philadelphia L. Ins. Co., 61 Pa. St. 107; Fischer v. Hope Mut. L. Ins. Co., 69 N. Y. 161.

<sup>4</sup> Ala. Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Whitehead v. New York L. Ins. Co., 102 N. Y. 143.

<sup>5</sup> Day v. Conn. General L. Ins. Co., 45 Conn. 480. In the preceding sections of this chapter we have necessarily referred to many cases where, in consequence of what it has, or has not, done, the company has waived certain rights which it otherwise would have had in regard to the policy, or has become estopped from asserting them. While it would be sequential with what has preceded to consider specifically at this place the matters of waiver and estoppel, so far as premiums are concerned, it seems preferable to delay such consideration for the present so as to treat of waiver and estoppel in life insurance matters under the one title, see *post*, § 431 *et seq.*

in accordance with the laws of the society. These provisions, being in the nature of penalties or forfeitures, are strictly construed as against the company, for, as says the Supreme Court of Michigan:<sup>1</sup> "It is well settled that no forfeiture can be established, except for a violation of the precise conditions laid down." The member of a benefit society is as such subject to liabilities and entitled to privileges. His corporate rights may be subject to the control of the corporation, but his rights as a party insured rest on the contract, which is found in the constitution, rules and regulations of the order. The directors, or managers, or officers, of such society, or order, have no right to make an assessment on a different basis than that prescribed in its laws.<sup>2</sup> And the members of such society and their beneficiaries have the right to rely upon the observance by the company of the requirements of its constitution and by-laws.<sup>3</sup> The rules, in regard to assessments, were well stated by the Kentucky Court of Appeals in *Mut. Aid Society v. Helburn*,<sup>4</sup> when it said: "Thus we see, that, in making assessments by the appellant upon its members, it does not act in a judicial, but in a ministerial, capacity. Therefore, no presumption can arise in favor of the regularity or legality of its assessments. That the appellant's board of directors, or an executive committee appointed by them, are the only persons authorized by appellant's charter to make assessments against its surviving members to pay the benefits due the representatives of its deceased members; that a deceased member of the society should have

<sup>1</sup> *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587.

<sup>2</sup> *Underwood v. Iowa Legion of Honor*, 66 Ia. 134; *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587; *Passenger Conductors' Assn. v. Birnbaum* (Pa.), 10 Cent. Rep. 63; 11 Atl. Rep. 378.

<sup>3</sup> *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Protection L. Ins. Co. v. Foote*, 79 Ill. 362; *Woodfin v. Ashville*, 6 Jones L. (N. C.), 558, and indeed all authorities cited in this and the subsequent sections of this chapter.

<sup>4</sup> 2 S. W. Rep. 495.

died, and that his representative was entitled to a benefit arising from his death; and that an assessment upon all of the surviving members was actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments,—are conditions precedent to the right of the appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessment until these things occur, nor do they forfeit their membership by reason of their failure to pay such assessments, unless these things have occurred. And when the society relies upon the failure of any of its members to pay his assessment as a forfeiture of his membership, and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated; otherwise the member cannot be said to be in default.” In a case in Missouri,<sup>1</sup> where the assessment upon its members was required to be made by the subordinate lodge, the Court of Appeals held that the member was not obliged to pay an assessment levied by the grand lodge. The plain provisions of the charter in regard to the manner of levying assessments cannot be overlooked in search of some rule more equitable<sup>2</sup> and the assessment must be made by the officers or authority named in the charter or by-laws.<sup>3</sup> If the assessment calls for the exercise of discretion on the part of the directors the power to make it cannot be delegated<sup>4</sup> and if the laws provide that an order for an assessment should be signed by certain officers, an unsigned order is invalid.<sup>5</sup> But where the by-laws of a mutual assessment life insurance organization made it the

<sup>1</sup> *Agnew v. A. O. U. W.*, 17 Mo. App. 254.

<sup>2</sup> *Slater Mut. F. Ins. Co. v. Barstow*, 8 R. I. 343.

<sup>3</sup> *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587; *Agnew v. Ancient Order United Workmen*, 17 Mo. App. 254; *Susquehanna Mut. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424.

<sup>4</sup> *Farmers' Mut. F. Ins. Co. v. Chase*, 56 N. H. 341.

<sup>5</sup> *Baker v. Citizens' Mut. F. Ins. Co.*, 51 Mich. 248.

duty of the directors to order an assessment upon the death of a member, and empowered the chairman to approve proofs of death, and at a meeting of the directors notice of a death was received, but not the proofs, and the directors instructed the chairman to examine the proofs when they should arrive, and instructed the secretary, if the proofs were found correct, to issue notice of an assessment, and thereafter the proofs were examined by the chairman and approved by him, and the assessment was made in good faith accordingly, and was just and proper; it was held that such an assessment was legal and was not open to the objection that it was made by the chairman and not by the directors.<sup>1</sup> If the laws provide that the directors shall fix the amount, they cannot order that a sum "not exceeding" a certain amount be called, the exact sum must be stated.<sup>2</sup> An assessment cannot be made for anticipated losses, the laws of the society making no provision for such a call<sup>3</sup> but they may exercise a reasonable discretion and make allowance for expenses and those who will not pay.<sup>4</sup> The statement of an assessment need not descend into minute detail, but must show with sufficient clearness all facts to enable the member to see the necessity for the call.<sup>5</sup> Where the laws of a mutual company provided that the membership should be assessed by classes, an assessment ignoring the classes was held invalid.<sup>6</sup> In general an assessment will not be binding unless it appears that it was made when the person assessed was a member; that the losses for which it was made accrued while he was a mem-

<sup>1</sup> *Passenger Conductors, etc., Ins. Co. v. Birnbaum (Pa.)*, 10 Cent. Rep. 63; 11 Atl. Rep. 378.

<sup>2</sup> *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504.

<sup>3</sup> *Rosenberger v. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207; *Crossman v. Mass. Mut. Ben. Assn.*, 143 Mass. 435.

<sup>4</sup> *Idem*; *Susquehanna Mut. F. Ins. Co. v. Gackenback*, 19 W. N. C. 287.

<sup>5</sup> *Lycoming Ins. Co. v. Bixby*, 15 W. N. C. 109.

<sup>6</sup> *Atlantic, etc., Ins. Co. v. Moody*, 74 Me. 385.

ber, that it was made as prescribed by the laws of the company.<sup>1</sup> If an assessment be not levied according to the constitution and by-laws it is illegal, the member is under no obligation to pay it and his rights are not affected by its non-payment.<sup>2</sup> The fact that the assessment is made in accordance with the custom of the order is immaterial, unless it be shown that the member had notice of such custom.<sup>3</sup> An assessment can be made by the directors after the company has made a general assignment for the benefit of creditors.<sup>4</sup> The superior governing body of a benefit society, incorporated under the laws of the State where it does business, cannot compel its members to pay assessments levied by order of a supreme lodge incorporated under the laws of another State. A case involving this question was decided by the Supreme Court of Michigan<sup>5</sup> which thus stated the facts and its opinion: "This is an application for a *mandamus* to compel the recognition of relator as a member of one of the subordinate lodges of the order of which respondent is the supreme governing authority in this State. As such member he stands insured by the respondent in the sum of \$2,000, payable on his death, or on his surviving for a specified term of years. He stands suspended by the respondent, and thereby loses his insurance, for refusing to recognize and pay an assessment made under the orders of the supreme lodge of the order, which is a corporation existing under the laws of Kentucky, and not subject to this jurisdiction. The assessment was made to pay losses on risks taken by the order in other States and by other State grand lodges. The re-

<sup>1</sup> Columbia F. Ins. Co. v. Kinyon, 37 N. J. L. 33.

<sup>2</sup> Underwood v. Iowa Legion of Honor, 66 Ia. 134; Agnew v. A. O. U. W., 17 Mo. App. 254; Conductors' Assn. v. Birnbaum (Pa.), 10 Cent. Rep. 63; 11 Atl. Rep. 378; American Mut. Aid Soc. v. Helburn, 8 Ky. L. Rep. 627; 2 S. W. Rep. 495.

<sup>3</sup> Underwood v. Iowa Legion of Honor, *supra*.

<sup>4</sup> Schimpf v. Lehigh Valley, etc., Ins. Co., 86 Pa. St. 373.

<sup>5</sup> Lamphere v. Grand Lodge A. O. U. W., 47 Mich. 429.

spondent is a Michigan corporation, existing under chapter 94 of the Compiled Laws of 1871. The relator is not liable to pay the assessment. It is not competent for the respondent to subject itself, or its members, to a foreign authority in this way. There is no law of the State permitting it, nor could there be any law of the State which would subject a corporation created and existing under the laws of this State to the jurisdiction and control of a body existing in another State, and in no manner under the control of our law. The attempt of the respondent to do this is an attempt to set aside and ignore the very law of its being. A *mandamus* will therefore issue as prayed.”<sup>1</sup> The express or implied assent of the member to an authority not within the scope of the charter, does not confer such authority nor estop such member from denying it.<sup>2</sup> Where the members are free under the society’s laws to pay the assessments or not, the company cannot compel payment nor can the court make an assessment for unpaid losses in proceedings to wind up the company.<sup>3</sup> Nor can the court assess where authority is conferred only upon the directors.<sup>4</sup> The question always is whether in the contract the assured promised to pay the assessments, or whether the payment was only a condition, the performance of which was optional.

§ 378. **Who Liable for Assessments.**—Members of benefit associations are under no obligation to pay assessments levied for deaths which occurred prior to the time when they became such, nor for those called to pay deaths occurring after the membership had ceased; but generally, and unless the laws provide otherwise, the issuance and ac-

<sup>1</sup> See also *Grand Lodge v. Stepp*, 3 Penny. 45.

<sup>2</sup> *Grand Lodge, etc., v. Stepp*, *supra*.

<sup>3</sup> *In re Protection L. Ins. Co.*, 9 Biss. 188.

<sup>4</sup> *Hill v. Merchants, etc., Ins. Co.*, 28 Grant. Ch. Up. Can. 560; *Duff v. Canadian, etc., Ins. Co.*, 6 Ont. App. 238. But see *McDonald v. Ross-Lewin*, 29 Hun, 87.

ceptance of the certificate furnishes sufficient consideration for the member's agreement to pay any assessment made during the time he should continue a member, and upon his failure an action will lie against him therefor, though of course if by the laws of the society payment of an assessment is optional with the member, no action will lie.<sup>1</sup> Failure to pay an assessment, levied on a member for a death which occurred prior to the date of his certificate, the assessment being in violation of the laws of the society, will not invalidate the claim of his representatives to benefits.<sup>2</sup> Where the by-laws of a benefit society provided that proofs of death should be made in a specified manner and laid before the directors, and if they so decided an assessment should be made upon each member of the class to which the deceased belonged, it was held<sup>3</sup> that the assessment could be made only on those who were members of the class subject thereto at the time the resolution was adopted. Members are liable for assessments to pay losses which occurred during the time they were such, although the insolvency of the company has been decreed.<sup>4</sup>

§ 379. Notice of Assessments. — Unless the laws of the society or company expressly provide otherwise, there is

<sup>1</sup> *McDonald v. Ross-Lewin*, 29 Hun, 87; *State v. Monitor Fire Assn.*, 42 Ohio St. 555; *Columbia F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Farmers', etc., Ins. Co. v. Chase*, 56 N. H. 341; *Stewart v. Northampton, etc., Ins. Co.*, 38 N. J. L. 436; *Tolford v. Church (Mich.)*, 33 N. W. Rep. 913; 9 West. Rep. 885; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662. All but the first of these cases, however, relate to the assessments of mutual fire insurance organizations.

<sup>2</sup> *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

<sup>3</sup> *Miller v. Georgia Masonic Mut. Life Ins. Co.*, 57 Ga. 221.

<sup>4</sup> *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. Eq. 15; *Commonwealth v. Mass. Mut. Fire Ins. Co.*, 112 Mass. 116; 119 Mass. 45. But see *Union Mut. F. Ins. Co. v. Spaulding*, 61 Mich. 77; 27 N. W. Rep. 860, where it was held that, after a member has withdrawn from the association, he is not liable for assessments made thereafter on a claim which existed before such withdrawal, but was not discovered until afterwards.



no liability on the part of a member to pay an assessment until notice thereof has been given in the manner provided in the constitution or by-laws. And where the association claims a forfeiture for non-payment of an assessment, it must show that the member was notified in the manner prescribed by the by-laws.<sup>1</sup> If, under the laws of the society which is composed of a supreme and subordinate lodges, the latter are to pay assessments upon notice from the former, no liability is imposed upon the subordinate lodges or its members, until due notice in conformity with the laws of the order is given, and good standing is not lost by a failure to pay an assessment of which no notice is given.<sup>2</sup> And no obligation rests upon the members of the subordinate lodge to pay an assessment until they in turn are notified of it in conformity with the laws of the order.<sup>3</sup> The Court of Appeals of Missouri thus states the law in regard to notice of assessments in these associations:<sup>4</sup> “There are many cases where a person must, at his peril, act upon the knowledge of a particular fact, however derived, or upon such information as should reasonably put him upon inquiry. But wherever the special law of the notice prescribes the form and manner in which it is to be given, especially when a forfeiture may result, the party to be affected will, as a general rule, not be bound by notice given in any other form or manner. Thus, when a man’s rights are to be adjudicated in a court of justice, he is entitled to just the form, manner and time of notice that are directed by the statute; otherwise he will not be bound by the pro-

<sup>1</sup> *Siebert v. Chosen Friends*, 23 Mo. App. 268; *Payne v. Mut. Relief Soc.*, 17 Abb. N. C. 53; *Supreme Lodge K. of H. v. Johnson*. 78 Ind. 110; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 298; *Sinking Springs Mut. Ins. Co. v. Hoff*, 2 W. N. C. 41.

<sup>2</sup> *Hall v. Supreme Lodge K. of H.*, 24 Fed. Rep. 450.

<sup>3</sup> *Agnew v. A. O. U. W.*, 17 Mo. App. 254; *Coyle v. Kentucky Grangers’ Mut. Ben. Assn. (Ky.)*, 2 S. W. Rep. 676; *Siebert v. Chosen Friends*, 23 Mo. App. 268.

<sup>4</sup> *Siebert v. Chosen Friends*, 23 Mo. App. 272.

ceedings, although bodily present in the court room, seeing and hearing all that may be done. The indorser of a promissory note may have a personal knowledge of the maker's intention not to pay, or of his failure to pay, at maturity. Yet the holder cannot subject him to any liability, without a notice of the dishonor, given in the form, time and manner, established by commercial law and usage. Mrs. Siebert might have heard a rumor, or have been informed by a friend, that assessment number 72 had been declared, and must be paid by a certain time. But she had a right to disbelieve the rumor, or the friend, until a knowledge of the fact was brought home to her in the way for which she had stipulated in her contract with the association. That contract was visible in the printed laws of the association, and in her acceptance of them in her application for membership." In a somewhat similar case the Supreme Court of Illinois said: <sup>1</sup> "It was competent for the contracting parties to fix their own terms in this respect, and, having fixed them, they must abide by them. Thirty days after the date of the notice, but not until then, the parties have contracted, if the money is not paid, the certificate shall be void. There was, therefore, no obligation to make a tender, in the absence of a notice, for the purpose of preventing a forfeiture." In an action on a certificate issued by a mutual life insurance company, conditioned that failure to pay assessments thirty days after notice should avoid the same, it appeared that two other members of the family of the assured were holders of certificates in the same company, and that three notices of the assessment enclosed in one envelope were received by one of them. It was held <sup>2</sup> that a finding that notice was not mailed to the insured would not be disturbed, such mailing being proved only by the general course of business of the company.

<sup>1</sup> *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 467.

<sup>2</sup> *Garretson v. Equitable, etc., Assn. (Ia.)*, 38 N. W. Rep. 127.

§ 380. **The Same Subject: Contents of Notice.** — The contents of the notice and its form should conform to the requirements of the by-laws or constitution of the society. Thus, where the by-laws required a notice of an assessment to be given to the members, which should include a list of deaths since the last assessment notice and notifying them of the amount due to the benefit fund, a notice which did not do this was held void.<sup>1</sup> In this case the Supreme Court of Michigan said: "The defendant company was insisting on a forfeiture. The entire defense rested upon it to defeat the plaintiff's claim. Forfeitures of policies of insurance are not to be favored. The beneficiaries under them are, perhaps, we may safely say, in two-thirds of the cases, persons not learned in the technicalities of the language in which they are not unfrequently couched; and in construing them courts will, whenever a forfeiture is claimed, preserve, if possible the equitable right of the holder. The two things omitted in this notice mailed, were to be notified to Mr. Miner; and the time for making payment, which gave the right to the forfeiture claimed, did not begin to run until the proper notice was given as required by the by-law quoted. And there was something of substance in the part omitted from the notice. In case of the absence or loss of his certificate the notice would furnish him with the only information of the amount he was called upon to pay; and the member was entitled to know the number of deaths since the last assessment, for by this information alone could he form any opinion as to the honest administration of the company's affairs, or as to the care exercised in the selection of lives and members."<sup>2</sup> A notice requiring payment in thirty days when the by-laws

<sup>1</sup> *Miner v. Mich. Mut Ben. Assn. (Mich)*, 29 N. W. Rep. 852.

<sup>2</sup> *Bates v. Detroit Mut. Ben. Assn.*, 51 Mich. 587; 17 N. W. Rep. 67; *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Supreme Lodge K. of H. v. Johnson*, 78 Ind. 110; *Siebert v. Chosen Friends*, 23 Mo. App. 268.

allowed forty, was held a nullity.<sup>1</sup> Where the notice is required to be given by a certain person, as by the general secretary, the notice must be signed by him but may be mailed by one subordinate, as the local secretary.<sup>2</sup>

§ 381. **The Same Subject: Service of Notice.** — Notice may be given in any way the by-laws may prescribe, for the parties may agree what shall or shall not be notice. If the by-laws provide that notice may be given by mail it is sufficient to prove the mailing; and the failure of the notice to reach the assured, by reasons of its miscarriage in the mail, or the absence of the assured, will not excuse the non-payment of the assessment within the prescribed time.<sup>3</sup> It is competent for the parties to agree what shall be notice and it is enough to conform to the agreement as contained in the by-laws, as for example, that publication in a newspaper shall be notice.<sup>4</sup> Where the charter provided that the members should be *notified* of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit their rights, it was held that such personal liability could not attach by merely mailing the notice if it was not in fact received.<sup>5</sup> In this case the court says: "As to the second point, was the fact of mailing the paper which contained the information for the member sufficient of itself to constitute the notification required by the charter? The proposition here is that it makes no

<sup>1</sup> *Haskins v. Kentucky Grangers' Mut. Ben. Soc.*, 7 Ky. L. Rep. 371; *Frey v. Wellington Mut. Ins. Co.*, 4 Ont. App. 293.

<sup>2</sup> *Payne v. Mut. Relief Soc.*, 6 N. Y. S. Rep. 365; 17 Abb. N. C. 53.

<sup>3</sup> *Greeley v. Iowa State Ins. Co.*, 50 Ia. 86; *Yoe v. B. C. Howard M. B. Assn.*, 63 Md. 86; *Weakly v. Northwestern B. & M. A. Assn.*, 19 Bradw. 327; *Borzraefe v. Supreme Lodge K. & L. of H.*, 22 Mo. App. 127; *Epstein v. Mut. Aid, etc., Assn.*, 28 La. Ann. 938.

<sup>4</sup> *Northampton, etc., Ins. Co. v. Stewart*, 39 N. J. L. 486; *Epstein v. Mut. Aid, etc., Assn.*, 28 La. Ann. 938. In case of advertising the time runs from date of last publication.

<sup>5</sup> *Castner v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 273.

difference whether the member ever gets knowledge of the assessment upon him or not, provided notice of it is regularly mailed to him, and therefore the contention is to be viewed on the assumption that he does not get it. The language of the charter is that the member is to be '*notified*' by the secretary or otherwise, either by *circular* or a verbal *notice*.' The consequences to flow from this notification are admitted to be important. A fixed personal liability is to depend upon it; and further, in case of failure to respond by payment of the sum assessed as communicated by the '*notice*,' during a given number of days, the member is to stand unprotected by his policy and wholly without remedy or redress in case of loss. In principle it is not easy to distinguish the nature of the required notification from the office and object of service of process, and there would seem to be as much reason for real notice in the case in question as in the case of an action. The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the persons insured, eventuate in wide-spread loss and injustice. No construction, open to so much objection, should be admitted unless rendered necessary by the terms of the charter; and they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed, or sent or forwarded. The members are to be '*notified*,' — that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members or by delivery to them of written statements through the agency of the post-office or some other." If the laws of the society provide that the member shall be notified of assessments, but does not state how he shall be notified the notice must be personal and actual.<sup>1</sup>

<sup>1</sup> *Wachtel v. Noah Widows and Orphans' Soc.*, 84 N. Y. 28; *Siebert v.*

§ 382. **From what time the Period allowed for the Payment of Assessments Dates.**—Where the laws of the society require that the assessments shall be paid within a certain number of days “from the date of the notice” thereof, the date will be construed to mean the day it is delivered or received, and not the date written in the notice or the day it is mailed, and in computing the number of days the day on which the notice is received will be excluded.<sup>1</sup> Where, by the terms of the contract, the assured agreed to pay to the association an assessment upon the death of any member, “within thirty days after date of said death, being notified thereof by publication in one daily newspaper published in the city of New Orleans, in English, German, and one in French for five consecutive days,” it was held that under this clause the assured was allowed the entire thirty days, commencing and counting from and after the last of the five days of publication, within which to pay an assessment.<sup>2</sup> But the laws of the society may provide otherwise, in which case the agreement of the parties determines the question.<sup>3</sup> The member may waive the manner of giving the notice of an assessment as by corresponding with the company about paying it.<sup>4</sup>

§ 383. **Manner of Paying Assessment.**—Unless the constitution and by-laws require the payment of the assessment in money there is no reason why the same rule should not apply as in the case of life insurance companies and payment be made by note, check, money order or anything

Chosen Friends, 23 Mo. App. 263; *Castner v. Farmers' Mut. F. Ins. Co.*, *supra*; *Borgraefe v. Supreme Lodge, Knights and Ladies of Honor*, 22 Mo. App. 127.

<sup>1</sup> *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88; *National Mut. Ben. Assn. v. Miller* (Ky.), 2 S. W. Rep. 900; *Wetmore v. Mut. Aid, etc., Assn.*, 23 La. Ann. 770.

<sup>2</sup> *Wetmore v. Mutual Aid, etc., Assn.*, *supra*.

<sup>3</sup> *Weakly v. Northwestern Ben. & Mut. Aid Assn.*, 19 Bradw. 327.

<sup>4</sup> *Hollister v. Quincy Ins. Co.*, 118 Mass. 478.

that may be accepted by the agent as money.<sup>1</sup> It is no excuse for non-payment of an assessment that the company owes the member a less sum, if he does not offer to pay the balance.<sup>2</sup> Payment may be made to any officer authorized to receive, either in the lodge or on the street,<sup>3</sup> any custom and usage to the contrary notwithstanding.<sup>4</sup> Unless the laws of the order provide that local, or subordinate, lodges may extend credit for assessments, this cannot be done, and if, by the rules of the society, non-payment of an assessment *ipso facto* works a suspension, or forfeiture, then the only thing that will save the non-paying member is for his lodge to pay the assessment for him. This it may do, unless its laws forbid, and in event of its paying the assessment the member becomes the debtor of the lodge. But if the laws of the order require that to suspend a member for non-payment of an assessment some affirmative action be taken by the lodge, failure on the part of the latter to do such affirmative act, required to effect a suspension, does not change the *status* of the delinquent member who remains in good standing until suspended by the lodge. This failure on the part of the lodge to take action may virtually amount to giving credit, for the member may pay up before anything is done. And the lodge thus remiss in its duty is of course responsible to its superior for its action.<sup>5</sup>

§ 384. What does not Excuse Non-payment. — Neither insanity, sickness nor absence is an excuse for non-payment of assessments, the payment being an act that can be

<sup>1</sup> *Kline v. National Ben. Assn.*, 111 Ind. 462; 11 N. East. Rep. 620; 9 West. Rep. 284; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141; *Life Ins. Co. v. Dunklee*, 16 Kan. 158.

<sup>2</sup> *Hollister v. Quincy Ins. Co.*, 118 Mass. 478.

<sup>3</sup> *Manson v. Grand Lodge, etc.*, 30 Minn. 509; 16 N. W. Rep. 395.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Borgraefe v. Supreme Lodge K. & L. of H.*, 22 Mo. App. 127, *post*, § 388.

performed for the member by some other person.<sup>1</sup> Nor can the fact advantage that enough was due the member from another, but distinct, fund of the lodge to pay the assessment.<sup>2</sup> But it would, of course, be competent for the parties to agree in a competent way, as in the by-laws of the society, that sickness or any other condition of the member should excuse the payment.

§ 385. **Consequences of Non-payment: Suspension: Reinstatement.**—Unless the constitution and laws of the society make non-payment of an assessment operate as a forfeiture, the failure of a member to pay such assessment only makes him liable to expulsion from the society or suspension from its benefits, for which some affirmative action of the lodge, or society, is necessary, and the mere act of the secretary in marking the member's account as "suspended" is not sufficient.<sup>3</sup> If the member is by some affirmative act suspended by the lodge, and has notice of such act and does not exercise the right of appeal secured him by the laws of the order, the action of the lodge, if such lodge had jurisdiction, is final and cannot be assailed in an action on the certificate after a member's death.<sup>4</sup> But the attempt of a superior officer, or lodge, to suspend a lodge or its members, without notice and authority to try such lodge or members, is a usurpation which cannot affect the legal rights or *status* of any one.<sup>5</sup> Forfeiture cannot be declared after the death of the member.<sup>6</sup> If, however, by

<sup>1</sup> *Hawkshaw v. Supr. Lodge K. of H.*, 29 Fed. Rep. 773; *Carpenter v. Centennial M. L. Assn.*, 68 Ia. 453; *Yoe v. Benev. Assn.*, 63 Md. 86; *ante*, § 359.

<sup>2</sup> *Ancient Order United Workmen v. Moore*, 1 Ky. L. Rep. 93.

<sup>3</sup> *Schen v. Grand Lodge, etc., Independent Foresters*, 17 Fed. Rep. 214; *Supple v. Iowa State Ins. Co.*, 58 Ia. 29; *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200.

<sup>4</sup> *Karcher v. Supreme Lodge K. of H.*, 137 Mass. 368; *Chamberlain v. Lincoln*, 129 Mass. 70; *Mulroy v. Knights of Honor*, 28 Mo. App. 463.

<sup>5</sup> *Hall v. Supreme Lodge K. of H.*, 24 Fed. Rep. 450.

<sup>6</sup> *Olmstead v. Farmers' Mut. F. Ins. Co.*, 50 Mich. 200.



the laws of the society, non-payment of an assessment operates as a forfeiture, the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time.<sup>1</sup> Judge Seymour D. Thompson, of the St. Louis Court of Appeals, thus states the rule and its modifications:<sup>2</sup> “ It was argued in behalf of the plaintiff, at the bar, that there was no forfeiture in this case, because the declaration of a forfeiture is a judicial act, and neither Ada Lodge, nor any other judicatory having the power to declare a forfeiture, had so adjudged. This contention has no foundation, in view of the fact that under the provision of section three, of law two, above quoted, it is not necessary that the lodge or any other judicatory of the order should adjudge a forfeiture against a delinquent member for non-payment of an assessment for a death benefit, but that, on the contrary, the suspension attaches by operation of law. There is, in view of this provision, a plain distinction between this case and cases which have arisen under the constating instruments of mutual insurance companies, and other benevolent orders of this character, where the governing statute recites that for the non-payment of dues, or other named delinquency, the member *may be* suspended by the lodge or other judicatory. Here the member is not suspended, until the lodge or other designated judicatory exercises the power of suspension.<sup>3</sup> The reason is that, whatever right the lodge, or the order, may have against the member for an infraction of its rules, must be sought in conformity with the laws and rules of the order. The remedy therein prescribed must be exhausted before resort can be had to the judicial courts.<sup>4</sup> But where, as in

<sup>1</sup> Rood v. Railway Passenger, etc., Assn., 31 Fed. Rep. 62.

<sup>2</sup> Borgraefe v. Knights of Honor, 22 Mo. App. 127, 142.

<sup>3</sup> Olmstead v. Mut. F. Ins. Co., 50 Mich. 200.

<sup>4</sup> Chamberlain v. Lincoln, 129 Mass. 70.

this case, the suspension attaches by operation of law upon an event named, and the member dies before the suspension has been set aside, in conformity with the rules of the order, there can be no recovery upon his benefit certificate.” This view is generally sustained by the authorities.<sup>1</sup> Where the constitution provides that no benefits are to be paid while the lodge is under suspension for refusing, or neglecting to forward the assessments to the supreme lodge, and a member dies while his lodge is suspended, the rights to benefits, which were suspended with the suspension of the lodge, are restored with its restoration.<sup>2</sup> The laws of benefit societies generally provide that a member, suspended for non-payment of an assessment, may be restored upon doing certain acts. On principle these laws are to receive a liberal construction. Where the rights of a suspended member were to be restored, upon his payment of arrearages, it was held that he did not have to tender the amount at a meeting of the lodge, but might pay to the proper financial officer at any place, and that no consent or action on the part of the lodge was necessary to his restoration.<sup>3</sup> A case was recently decided in New York,<sup>4</sup> in which the facts were these: The defendant issued to one Dennis a certificate of membership, to which were annexed rules and conditions, one of which required that the members should, within thirty days after the mailing of a notice of assessment, pay the same, and provided that if the

<sup>1</sup> *Ill. Masons' Benev. Soc. v. Baldwin*, 86 Ill. 479; *Rood v. Railway Passengers', etc., Assn.*, 31 Fed. Rep. 62; *Madeira v. Merchants' Exch., etc., Soc.*, 16 Fed. Rep. 749; 5 McC. 258; *Yoe v. B. C. Howard M. B. Assn.*, 63 Md. 86; *McDonald v. Ross-Lewin*, 29 Hun, 87; *Blanchard v. Atlantic Mut. F. Ins. Co.*, 33 N. H. 9; *Am. Mut. Aid Soc. v. Kilburn*, 7 Ky. L. Rep. 750.

<sup>2</sup> *Sup. Lodge K. of H. v. Abbott*, 82 Ind. 1.

<sup>3</sup> *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509; 16 N. W. Rep. 395.

<sup>4</sup> *Dennis v. Massachusetts Ben. Assn.*, 47 Hun, 338; one judge, however, dissented.

assessment should not be received by the company within that time the contract should lapse and be void, but that "for valid reasons to the officers of the association (such as a failure to receive notice of an assessment), he may be reinstated upon paying assessment arrearages." On February 12, 1886, a notice of an assessment was mailed to Dennis and received by him, but was not paid within the thirty days, he being stricken with apoplexy on March 8th, and remaining unconscious until March 19th, when he died. The beneficiary, on March 31st, tendered the arrearages to the company, which declined to receive them and refused to be bound by the policy. The action was brought by the assignee of the beneficiary and on the trial the court directed a verdict for the defendant. On appeal it was held that this was error, that the question as to whether the fact that the party assessed, who had paid many previous assessments, was rendered powerless, by a sudden calamity, before the expiration of the thirty days, was not a "valid reason" within the meaning of the contract, should have been submitted to the jury. In this case, the majority of the court say: "What right would the member have had if he had recovered his reason on the day he died. In the first place, the words were intended to be operative. The defendant obtained the premiums or agreement to pay assessments upon them. They assured the members that, if a valid reason was furnished for the default, it should not be conclusive. The use of the restrictions as to the validity of the excuse to the officers of the company did not mean to make them sole arbiters of the validity of the reason. The company illustrate by citing an instance of a good excuse by the term 'such as a failure to receive notice of an assessment.' If an assessment notice had not been received without the fault of the member, can it be doubted but that the officers were bound to acknowledge it and reinstate the member upon payment of arrearages? The

company say that is a good excuse and impliedly say that other good reasons for the default must be acknowledged also. The Court of Appeals have decided that a discretion given to trustees is not personal.<sup>1</sup> Is the reason assigned a valid reason under the contract. There can be no doubt of this fact. The assessed had thirty days and before he paid the assessment he was rendered powerless by sudden calamity — his intent to pay is manifest by numerous previous payments. This was the construction put on the rule by the defendant. They again, after he was unconscious, notified the member of the forfeiture for non-payment and that the contract might be renewed if in good health. This condition, in respect to good health, is not in the rule and the officers had no right to add it to the rule. If a valid reason existed for the default the member must be reinstated, because of the valid reason for the default and not because he had a valid reason and was in good health. The rule, as created by the company in this respect, would exclude cases where it was vital that they should be included in the contract. If the good reason was rejected in cases of ill health or death the insured will lose a real value in the contract. If members become sick or die the policy is at an end, no matter how completely the default may be excused. This would make a very unfair contract, not within the words of the rule and one which the company would be unwilling to print in its rules. We, therefore, think that the validity of the reason assigned should have been submitted to the jury.” A similar question arose in New Jersey,<sup>2</sup> the facts being as follows: The by-laws of an unincorporated mutual insurance association provided that in case a member had, for failure to pay an assessment promptly, been dropped from the association by

<sup>1</sup> *Hull v. Hull*, 24 N. Y. 647; *The Duplex Boiler Co. v. Garden*, 101 *Id.* 387.

<sup>2</sup> *Van Houten v. Pine*, 38 N. J. Eq. 72.

the secretary, the board of directors should have power to reinstate him on his presenting them a reasonable excuse for such failure, and paying the sum in arrear. A member being delinquent appeared before the directors and offered a sufficient reason for his delinquency, and the board refused to reinstate him, because they alleged that his health was then precarious. He died very soon afterwards. A bill was filed against the society and the court held that it would, after the death of the member, examine into and determine the adequacy of the reason offered by the member for his delinquency, and, in a proper case, compel the association to pay the amount of the insurance. The court says: "The excuse given by Van Houten when he appeared before the board and asked to be reinstated was ample and ought to have been accepted. He had provided for payment of the money within the time limited by the by-laws by engaging Mr. Tucker, a director, to attend to the matter for him and prevent any delinquency, and Mr. Tucker had, at his request, undertaken to do so. It was merely Mr. Tucker's forgetfulness that caused the delinquency. It appears by the answer that the excuse was considered satisfactory, but that Mr. Van Houten's physical condition at the time of making the application was taken into the account adversely to him. In the letter of the president to him, set forth in the answer, that is given as the only reason for denying the application. The letter states that in the opinion of a large majority of the members of the board of directors it was deemed inexpedient to restore him to membership in consequence of his impaired health. \* \* \* It is manifest from the testimony that the by-laws were enforced against Van Houten with unwonted vigor and stringency. But conceding the right of the association to do so it was nevertheless clearly the right of Van Houten, under the circumstances, to be reinstated. And in such a suit as this, against such an association (an unincorporated mutual

benefit society), and under such circumstances as this case presents, it is proper for the court to determine the question whether the member was properly excluded or not; to decide whether the action of the trustees or agents to whom the management of the affairs of the association was intrusted was lawful or not, to judge whether the member, by the imputed misconduct or delinquency, ought reasonably to be held to have forfeited his claim to the advantages which the society promised, and in view of which he had, up to the time of the alleged exclusion, discharged his duties to it.”<sup>1</sup>

**§ 386. To Whom Money Collected on an Assessment Belongs.**—Money received by the trustees of a mutual benefit association, from an assessment imposed upon the members to pay to the widow of a deceased member the amount which she is entitled to recover, belongs to the association and not to the widow.<sup>2</sup> And it cannot be claimed that, when such an association has received the money from an assessment for the purpose of paying a claim on a certificate issued to a deceased member of the society, the association thereby became the agent of its members for the purpose of paying the money upon the claim and had no right to contest its validity or withhold the payment of the money. While the society is in a certain sense the agent of the members of the company, it is an agent with special and definite powers and limitations, and the true and obvious construction of these powers and limitations forbids payment upon a claim which it is able to show was procured through misrepresentation or fraudulent suppression of facts, concerning which it required answers from the deceased member when he applied for membership. That the association has realized the money with which to make payment is no waiver of the duty to see to it that payment was due. That duty it still

<sup>1</sup> See also *Oates v. Supreme Court of Foresters*, 4 Ont. Rep. 535.

<sup>2</sup> *Fisher v. Andrews*, 37 Hun, 176.

owes to its members who have paid their assessments trusting to the fidelity of the company to protect them and the fund from invalid claims.<sup>1</sup>

**§ 387. Authority to Accumulate Surplus from Assessments.**—A benefit society cannot accumulate a reserve fund, or surplus in excess of the amount required to pay death claims, unless its laws confer such authority and there is nothing to the contrary in the statutes of the State authorizing the society. Under the Massachusetts statute it has been held that societies organized under it cannot become financial institutions with the capacity of accumulating and holding funds to an unlimited amount, but can only hold at one time the amount of one assessment.<sup>2</sup>

**§ 388. Power of Subordinate Lodges to Waive Requirements of Laws of the Order as to Assessments.**—Whether subordinate lodges can waive the requirements of the laws of the order of which they are constituent parts in regard to assessments has been questioned;<sup>3</sup> but questions of waiver and estoppel in regard to assessments of benefit societies will be more appropriately discussed in a subsequent chapter upon the subject of waiver and estoppel in general and to that the reader is referred.<sup>4</sup>

**§ 389. Dues.**—When the affairs of a mutual benefit society are conducted by means of a complex organization consisting of grand, or supreme, and subordinate lodges, the members of the latter enter into an obligation to pay two kinds of contributions. The first is the assessments, levied by the superior authority to meet death benefits; the

<sup>1</sup> *Mayer v. Equitable Reserve Fund L. Assn.*, 42 Hun, 237. See also *Swett v. Relief Society*, 78 Me. 541.

<sup>2</sup> *Crossman v. Massachusetts Ben. Assn.*, 143 Mass. 435; 3 N. Eng. Rep. 517; 9 N. East. Rep. 753.

<sup>3</sup> *Borgraefe v. Sup. Lodge, K. & L. of H.*, 22 Mo. App. 127.

<sup>4</sup> *Post*, § 431, *et seq.*; *ante*, § 383.

second is the amount required to be paid, in monthly or quarterly installments to the subordinate lodge for its support. In some associations, not consisting of local and grand lodges, a stated sum is to be paid annually or oftener, in addition to assessments on death claims, for the expenses of the organization. The first class of contributions, of which we have already treated, is called "assessments," the second is known as "dues." The laws of the orders generally provide that the dues be paid by each member at certain times without notice and no action of the lodge or its officers is required to make them due and payable. The provisions of the laws in this respect are also part of the contract and their construction is governed by the same rules as the provisions in respect to the assessments. If non-payment of the dues works a forfeiture, the provisions of the laws are to be strictly construed. Non-payment of dues, however, if so stipulated, will of itself work a forfeiture.<sup>1</sup> But if not so provided in the by-laws, expulsion, or suspension for non-payment of dues must be upon trial and after due notice.<sup>2</sup> Unless the by-laws so provide, dues for the monthly, quarterly, or semi-annual term are not payable in advance and a member is not in arrears for their non-payment until after that term has ended. In a case where the by-laws provided that a member should not be in good standing who was more than six months in arrears,<sup>3</sup> it was held that the six months began to run from the day after the last day of the term for which the dues were to be paid. In this case the court said: "Each lodge has the power to regulate that matter for itself, may make

<sup>1</sup> *Mandego v. Centennial Mut. Life Assn.*, 64 Ia. 184; *American Mut. Aid Soc. v. Helburn*, 8 Ky. L. Rep. 627; 2 S. W. Rep. 495.

<sup>2</sup> *Diligent Fire Co. v. Commonwealth*, 75 Pa. St. 291; *Commonwealth v. Beneficial Soc.*, 2 S. & R. 141; *Commonwealth v. German Soc.*, 15 Pa. St. (3 Harris), 251; *Borgraefe v. Sup. L. K. of H.*, 22 Mo. App. 127; *Wachtel v. Noah Widows and Orphans' Soc.*, 84 N. Y. 28; 9 Daly, 476.

<sup>3</sup> *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122.



the dues payable in advance, or at the end of the period for which they are leviable; but the pay-day does not come until the time fixed for it, and they cannot, in the nature of the words used to impose the forfeiture insisted upon, be in arrears until that day is past, whatever day it be. The fact that the members may pay the dues at any time during the term, that is to say, in advance of the day fixed for obligatory payment, does not at all affect the question; nor does the fact, if it be so, that most of the members do pay before that final day of reckoning the charge, affect it; nor does the opinion of the members, or of the officers of the lodge, or of the lodge itself affect it. These words of the by-laws become part of the contract for life insurance, and, in the courts, must receive the ordinary interpretation put upon the contracts containing them.”<sup>1</sup> If, by the by-laws of the order, or society, notice is to be given before the dues are payable, such notice is a condition precedent, which must be performed before forfeiture for non-payment can be enforced. The same rules apply to dues as to assessments in respect to notice, payment and forfeiture. The Court of Appeals of Maryland has accurately stated the law as to notice in an opinion which may here be given with advantage. The case was one involving the liability of the association for a benefit payable on the death of the member, and the defense was forfeiture for non-payment of dues. The facts are sufficiently stated in the opinion. In this case<sup>2</sup> the court said: “The whole contract between the appellant association and Robertson, the insured, is contained in the certificate of membership issued to Robertson, and the rights of the parties in this case must depend upon that certificate alone. \* \* \* The first article of the certificate of membership is as follows: ‘1. It is

<sup>1</sup> *Watson v. Jones*, 13 Wall. 679; *McMurry v. Supreme Lodge K. of H.*, 20 Fed. Rep. 107.

<sup>2</sup> *Mutual Endowment Ass. Assn. v. Essender*, 59 Md. 463.

agreed, that the said Nathaniel C. Robertson, shall pay the sum of twenty-five dollars, as a membership fee; and further the sum of \$2.50 quarterly, for expenses, to be paid said association, and also such sums as may be required by the conditions hereto annexed, for mortuary assessments.' If this article was the only part of the certificate that related to the quarterly dues, it would have been the duty of the insured to have paid these expenses without any call or notice. But by the sixth clause in the certificate a different face is put upon the matter. That clause is in these words: '6. The holder of this certificate further agrees, and accepts said certificate upon the express condition, that if the said assessment or quarterly dues shall not be paid at the office of said association, within thirty days after date of notice, the certificate shall be null and void and of no effect.' By this latter clause the association assumed the burden of giving the insured a notice, and the insured did not forfeit his membership, if he paid his dues at any time within thirty days from the date of such notice. Taken and construed together as the first and sixth clauses of the certificate must be, they mean this, that while the insured, Robertson, after having paid his membership fee of twenty-five dollars, agreed to pay the association two dollars and a half quarterly, the association agreed not to forfeit his membership, unless he made default in the payment of his quarterly dues and assessments for more than thirty days after they gave him notice. There is no question raised as to the assessment for death, but only as to the quarterly dues. Robertson may have neglected or omitted to pay his quarterly dues, but that fact alone would not, without the notice from the company, deprive him of his membership. The notice was a condition precedent to the forfeiture and it becomes important to inquire what such notice should contain. We think it quite clear that the notice contemplated by the sixth clause, must mean a

notice given after the quarterly dues were payable. It does not mean a notice given in advance and before the quarterly dues were payable; for if that were so, Robertson could have been notified on the very day of the issue of the certificate (Dec. 23, 1879), that he must pay his quarterly dues for the whole of the next year or even longer. This was certainly not contemplated by either party to the contract, and is not borne out by the language of the clause. If Robertson, then, was entitled to his notice *after* his dues were payable, the first notice that the company could properly give him, was after his first quarterly payment fell due. Then the notice given him must be reasonably in accord with the contract, and must call upon him, or notify him with reasonable certainty what he must do within the next thirty days. Now the notice actually sent to Robertson, according to the defendant's testimony, was the following: 'Baltimore, Md., April 15th, 1880. You are hereby notified, that your annual dues for the year ending April 15th, 1881, are to be paid at this office. Amount \$10. Send this notice back with your remittance, when it will be receipted and returned to you.' By that notice Robertson was called on to do what he had not contracted to do. He had contracted to pay \$2.50 at the end of each quarter, and was called on to pay ten dollars as an annual fee, and in advance. Nor did the association do what they had contracted to do. Their contract was, as we have before said, to notify the insured after his payments were due, but they in fact notified him of claims that were to fall due in the future, and demanded payment in advance against the terms of the agreement. Now, forfeitures are not favored in the law, and the courts are always ready to seize hold of any circumstances that can reasonably avoid so harsh a measure as a forfeiture. In this case the association relies upon this notice as sufficient

ground for the forfeiture of the interest of Robertson in the company. But in all such cases where a forfeiture is sought to be enforced through a notice, as a condition precedent, the party seeking to enforce it must show that he has complied at least with reasonable certainty with all the conditions precedent, and the other party is entitled to such notice as his contract calls for. In the case of *Johnson v. Lyttle's Iron Agency*,<sup>1</sup> the court unanimously held that a notice to a shareholder in which he was charged more *interest* than he ought to have been, was on that account bad, and not sufficient to cause a forfeiture of his shares, and lay down the rule that the condition precedent must be strictly complied with. While we are not inclined to adopt a rule so strict as the one laid down in this case, still there is a wide, and in our opinion fatal, variance in this case between the notice actually given, and the one required by the terms of the contract, both in the amount required to be paid, and the time of the payment. Such a notice is wholly insufficient to work so grave a consequence as the forfeiture of a valuable interest to the insured." In a case in Illinois<sup>2</sup> the defendant was a voluntary association composed of subordinate lodges. The constitution adopted for the government of such subordinate lodges provided that "the manner of suspension for the non-payment of dues and assessments shall be detailed in the by-laws of every lodge and is left to their option." The subordinate lodge in question never adopted any by-law on the subject of suspension as required by this provision. Deceased was declared suspended from such lodge for non-payment of dues. Six days before his sudden death by heart disease, he gave the amount due to the secretary, who took the money and said he would bring the matter before the lodge

<sup>1</sup> 5 Chan. Div. 687.

<sup>2</sup> *District Grand Lodge v. Cohn*, 20 Bradw. 335.

at its next meeting. The court held that the suspension of deceased was without authority and void and that the payment was in time. Further, that the fact that the lodge, in the absence of a by-law, was accustomed to pursue a particular course in regard to suspensions, did not in this case give such custom the force of a by-law.

## CHAPTER XII.

### MATURITY OF CONTRACT: PROOFS OF LOSS: GOOD STANDING.

- § 395. **Maturity of Life Insurance Contract: Amount to be Recovered.**
  - 395a. Permanent Disability: Accident.
  - 396. Who Entitled to Receive Amount of Insurance.
  - 397. Rights of Creditors when Payees in Policies.
  - 398. Liens on Insurance Money.
  - 399. Creditors as Beneficiaries of Members of Benefit Societies.
  - 400. Compliance with Terms of Policy as to Payment Relieves Insurer.
  - 401. Conditions Precedent to Recovery to be Performed after Loss.
  - 402. No Liability *Civiliter* at Common Law for Destruction of Human Life.
  - 403. Conditions as to Notice and Proofs of Loss.
  - 404. Substantial Compliance with Conditions Sufficient.
  - 405. Notice of Loss.
  - 406. Proofs of Loss: By Whom Made.
  - 407. Form and Contents of Proofs.
  - 408. To Whom and at What Place Proofs Must be Furnished.
  - 409. When Company Refuses to Furnish Blank Forms.
  - 410. Effect of Failure to Furnish Proofs.
  - 411. On Receipt of Proofs of Loss Insurer must Point out Defects, if any Exist, within a Reasonable Time.
  - 412. Objections to Proofs Must be Specific: Insurer Must not Mislead Assured.
  - 413. When Proofs are Unnecessary.
  - 414. Good Standing.

§ 395. **Maturity of Life Insurance Contract: Amount to be Recovered.** — In contracts of life insurance companies and those of benefit societies the money becomes owing from the insurer whenever the contingency insured against happens, although generally, by the terms of the contract, it is not due or payable until a certain number of days thereafter. Life insurance companies agree to pay the amount of the insurance either upon the death of the

insured, or when he shall arrive at a certain age; benefit societies undertake to pay either upon the death of the member, or when he shall become permanently disabled. Certain benefits may mature when the member is sick, but of these we have already spoken.<sup>1</sup> With life insurance companies and benefit societies alike, death, therefore, is generally the event which is to determine the contract and mature the liability. Unlike fire insurance contracts, where the insurer may never be called upon to pay, because the property may never burn, the undertaking of the life insurance corporations is to meet a liability, which is certain, for death is inevitable, and, if the premiums be paid by the insured according to agreement, the company must prepare to, at some time, fulfill its obligation. The sum to be paid is certain, for it is set forth in the policy, which is, as we have seen, a valued policy, because the full amount named therein is to be paid without deduction or allowances,<sup>2</sup> for the loss is total. No limit has ever been fixed upon the amount for which one can insure his life, for human life is something, which, in one sense, is priceless, and for which no compensation can be made, consequently a man's inclination, or ability to pay the premiums, can alone establish bounds to the insurance he may carry on his life; and when this life is ended, the amount to be recovered is that named in the contract and it cannot be questioned. When a creditor insures the life of a debtor different principles apply, for public policy neither permits a person to effect an insurance upon a life in which he has no insurable interest, nor does it allow the creditor to make the amount of his insurance upon his debtor's life disproportionate to the debt.<sup>3</sup>

<sup>1</sup> *Ante*, § 94.

<sup>2</sup> *Chisholm v. National Capitol L. Ins. Co.*, 52 Mo. 215; *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith, 268.

<sup>3</sup> *Mitchell v. Union L. Ins. Co.*, 45 Me. 104; *ante*, § 248, *et seq.*; *post*, § 397.

§ 395a. **Permanent Disability: Accident.** — In some benefit societies the benefit, or part of it, is payable to the member himself if he shall become permanently disabled. What is permanent, or total, disability, within the meaning of such provisions depends upon the language used in the contract defining it. Where the constitution of a benefit society provided that a member “permanently disabled from following his or her usual or other occupation” was entitled to a benefit; and in another section defined such disability as one which should “permanently prevent the member from following any occupation whereby he or she can obtain a livelihood;” it was held,<sup>1</sup> that the words, “or other occupation,” in the first mentioned section, could not be held to mean “or other of the same kind;” and the definition in the latter section was conclusive against one who, disabled from his own profession, had been working at another totally dissimilar one. “Total disability” naturally means being totally disabled from all kinds of business<sup>2</sup> unless by the contract the disability is to be only from the usual occupation of the assured.<sup>3</sup> In a case decided by the Supreme Court of Maine,<sup>4</sup> the insurance was to be paid “if the assured shall sustain bodily injuries by means aforesaid, which shall, independently of all other causes, immediately and wholly disable and prevent him from the prosecution of any and every kind of business pertaining to the occupation under which he is insured.” In construing this the court said: “The object to be accomplished by this contract was indemnity to the plaintiff for loss of time from

<sup>1</sup> *Albert v. Order of Chosen Friends* (U. S. Cir. Ct. D. Ky.), 34 Fed. Rep. 721.

<sup>2</sup> *Lyon v. Railway Passenger Ass. Co.*, 46 Ia. 631; *Saveland v. Fidelity & Casualty Co. (Ia.)*, 30 N. W. Rep. 237; *Rhodes v. Railway Pass. Ins. Co.*, 5 Lans. 77.

<sup>3</sup> *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546; 29 L. J. Ex. 340; 8 W. R. 816; affirmed, 5 H. & N. 557; 29 L. J. Ex. 484; 7 Jur. (N. S.) 74, Ex. Ch.

<sup>4</sup> *Young v. Travelers' Ins. Co.*, 13 Atl. Rep. 896; 6 N. Eng. Rep. 432.



being wholly disabled from prosecuting his business by an injury received as specified in the policy. He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only, he was as effectually disabled from performing his business as if he could do nothing required to be done, and while remaining in that condition he would suffer loss of time in the business of his occupation. \* \* \*

To entitle the plaintiff to recover, he was not required to prove that his injury disabled him to such an extent that he had no physical ability to do what was necessary to be done in the prosecution of his business, but it was sufficient if he satisfied them (the jury) that his injury was of such a character and to such an extent that common care and prudence required him to desist from his labors and rest as long as it was reasonably necessary to effectuate a speedy cure,—so that a competent and specified physician called to treat him would direct him so to do.” Under a provision in the laws of a society providing for payment to certificate holders who have become disabled by accident, the word, accident, will be given its primary and usual signification, as being an event that takes place without one’s foresight or expectation, and it may include an injury received by one in a common-law affray, where no fault on his part is shown.<sup>1</sup>

**§ 396. Who Entitled to Receive Amount of Insurance.** — The payee, or beneficiary, is usually named both in the policies of life insurance companies and the certificates of benefit societies and is the person entitled to demand and receive the sum stipulated to be paid upon the happening of the agreed contingency. The assured, or

<sup>1</sup> Supreme Council v. Garrigus, 104 Ind. 133..

person to whom the insurance is payable under a policy of a life insurance company proper, generally has a vested interest in the contract; so, if the policy on the life of one person is payable to another and the latter die before the termination of the life insured, then, when the policy matures, the personal representatives of the assured are the proper parties to collect the amount of the insurance. The laws of benefit societies generally provide who shall take in default of a valid designation of beneficiary, or in case the beneficiary dies in the life time of the member. If there is no exercise of the power of designation, or if the member survive the beneficiary, there may be a lapse of the power so that the benefit is payable to no one.<sup>1</sup> It has been held that if the original designation of a beneficiary is void, or if the member survives the beneficiary, the benefit is for the legal heirs of the member and the action is to be prosecuted in the name of his administrator, who is the proper party to receive the money.<sup>2</sup> But the question as who is the party entitled to receive is one generally determined by the constitution and laws of the society and has already been considered.<sup>3</sup> A policy of life insurance issued to one having no insurable interest in the life insured is void and there can be no recovery thereon because it is a wager and against public policy.<sup>4</sup> The personal representatives of the insured in a life insurance policy, taken out by one who has no insurable interest in the life insured, have no right of action on such a policy against the insurer, for there is no privity of contract between them, and the insurer is not affected by a notice from such personal representatives not to pay over

<sup>1</sup> *Ante*, chap. VII.

<sup>2</sup> *Rice v. New England M. Aid Soc. (Mass.)*, 5 N. Eng. Rep. 816; 15 N. East. Rep. 624; *Rindge v. Same (Mass.)*, 15 N. East. Rep. 628.

<sup>3</sup> *Ante*, chap. VII.

<sup>4</sup> *Life Insurance Co. v. McCrum*, 36 Kan. 148; 12 Pac. Rep. 517; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; *Helmetag v. Miller*, 76 Ala. 183; *ante*, § 248, *et seq.*

the money upon such a policy.<sup>1</sup> But the personal representatives of the insured under such a policy may recover its proceeds, if the money thereon has been paid to one not having an insurable interest, less the premiums paid.<sup>2</sup>

§ 397. **Rights of Creditors when Payees in Policies.**—Policies of life insurance are frequently made payable, or assigned, to creditors of the insured. In such cases questions have often arisen as to who was entitled to recover and as to the amount of the recovery. It seems settled that if there is only a reasonable margin between the amount of the debt and that of the insurance the creditor can recover and retain the entire proceeds.<sup>3</sup> But where the excess of the policy over the debt is so large as to indicate a wagering transaction, the creditor, if he collects the entire amount, can hold only the amount of his debt and the premiums paid by him, if any, with interest, and must account to the personal representatives of the insured for the balance.<sup>4</sup> The Supreme Court of Pennsylvania on two occasions<sup>5</sup> has said that the amount of a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest thereon during the expectancy of the life

<sup>1</sup> *Bomberger v. United Brethren, etc., Soc. (Pa.)*, 4 Cent. Rep. 694; 6 Atl. Rep. 41; *Coon v. Swan*, 30 Vt. 6.

<sup>2</sup> *Gilbert v. Moose*, 104 Pa. St. 74; 49 Am. Rep. 570; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643; *Amick v. Butler*, 111 Ind. 578; *Helmetag v. Miller*, 76 Ala. 183; *Dutton v. Willner*, 52 N. Y. 312; *Drysdale v. Piggott*, 8 DeG. M. & G. 545; *Lea v. Hinton*, 5 DeG. M. & G. 823.

<sup>3</sup> *Amick v. Butler*, 111 Ind. 578; 9 West. Rep. 842; 12 N. East. Rep. 518; *Batdorff v. Fehler (Pa.)*, 8 Cent. Rep. 230; 9 Atl. Rep. 468; *Grant v. Kline (Pa.)*, 9 Atl. Rep. 150; 7 Cent. Rep. 626.

<sup>4</sup> *Ruth v. Katterman*, 112 Pa. St. 251; *Gilbert v. Moose*, 104 Pa. St. 74; *Cooper v. Schaefer (Pa.)*, 9 Cent. Rep. 601; 11 Atl. Rep. 548; *Coon v. Swan*, 30 Vt. 6; *Warnock v. Davis*, 104 U. S. 775; *Cammack v. Lewis*, 15 Wall. 643. See *ante*, § 248, for a discussion of the subject of insurable interest.

<sup>5</sup> *Grant v. Kline*, 7 Cent. Rep. 626; 9 Atl. Rep. 150; *Cooper v. Schaefer*, 9 Cent. Rep. 601; 11 Atl. Rep. 548.

insured, according to the Carlisle tables, and the premiums. If a policy of life insurance is valid when issued it does not cease to be so by the termination of the interest of the insured in the life insured, nor is it affected by the subsequent diminution of such interest, unless it is so stipulated in the contract.<sup>1</sup> If the policy is taken out by the creditor on the life of his debtor, who pays the premiums, upon the payment of the debt the debtor is subrogated to the rights of the creditor. But if the creditor pays the premiums then his right to recover is not affected by the diminution, or payment, of the debt, or a subsequent cessation of insurable interest, nor by the fact that the debt is barred by statute of limitations or a discharge in bankruptcy. This has long been the rule in England where, even though the debtor knows that his creditor intends to insure his life and regulates his conduct accordingly, still if the creditor pays the premiums and has no bargain with the debtor for repayment nor charges the premiums to him, neither the debtor nor his representatives have any claim to the money.<sup>2</sup> And that this is the rule also in America can hardly be doubted. In a case in the Supreme Court of New York, afterwards affirmed by the Court of Appeals,<sup>3</sup> the facts were these: The creditor, acting in his own behalf, and not under an agreement with, or as the agent of the debtor, procured a policy of insurance to be issued upon the life of the latter, to an amount not exceeding the then existing

<sup>1</sup> *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Dalby v. India & London L. Ass. Co.*, 15 C. B. 365: 28 E. L. & E. 312; *Preston v. Neele*, 12 Ch. Div. 760; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650; *Scott v. Dickson*, 108 Pa. St. 6.

<sup>2</sup> *Courtney v. Wright*, 2 Giff. 337; 6 Jur. (N. S.) 1283; 9 W. R. 153; *Morland v. Isaac*, 20 Beav. 389; *Holland v. Smith*, 6 Esp. 11; *Bruce v. Garden*, 5 L. R. Ch. 32; 39 L. J. Ch. 334; 18 W. R. 384; *Knox v. Turner*, 5 L. R. Ch. 515; 39 L. J. Ch. 750; 23 L. T. R. 227; 18 W. R. 873; *Preston v. Neele*, 12 Ch. D. 760; 40 L. T. 303; 27 W. R. 642; *Freme v. Brade*, 2 DeG. & J. 582; 27 L. J. Ch. 697; 4 Jur. (N. S.) 748.

<sup>3</sup> *Ferguson v. Mass. Mut. L. Ins. Co.*, 32 Hun, 306; 102 N. Y. 647

debt of the latter to him, and himself paid the premiums falling due thereon up to the time of the debtor's death. Prior to the death of the debtor the debt was partially or fully paid and the debtor had received a discharge in bankruptcy. In an action on the policy the defense was a total want of insurable interest prior to, and at, and after the issuing of the policy. The Supreme Court held the company liable and in the course of the opinion<sup>1</sup> said: "There being a debt at the time the policy is issued it is then valid. It contains no condition referring to the continuance of the indebtedness. But on the contrary, the policy evidences a flat and positive promise to pay a given sum at the termination of the life named. Death removes the last condition precedent except, perhaps, the delivery of proofs of the death. Then the holder becomes entitled to demand the sum named in the promise. Of course, in fire policies, the nature of the promise is different. That is a contract of indemnity against loss. The nature and extent of the loss must be shown, and only to the making good of the loss is the insurer bound in the very terms of his contract. No statute has gone so far as to declare that a life policy, valid in its inception because of a creditor's interest in the life of his debtor, shall be invalid the moment the debt is paid.<sup>2</sup> Besides, from the nature of the contract, which is paid for by the creditor, he needs the payment of the policy to do complete justice to him. Suppose he has received, subsequent to payment of premiums for years, the debt due from his debtor, he has thus received only what it may be assumed he has advanced or loaned to his debtor. He has received nothing for the series of premiums he has delivered over from year to year to the insurer to keep alive the policy. So, too, in the case at hand, if we were to hold that the policy was avoided

<sup>1</sup> 32 Hun, 306, *supra*.

<sup>2</sup> Goodwin v. Mass. M. Life Ins. Co., 73 N. Y. 497.

by payment or discharge in bankruptcy of the debt, the creditor would surely be the loser of the premiums paid, after the payment of his debt or the discharge in bankruptcy, and the insurance company would be the gainer. It would keep in its coffers moneys which it received as a consideration for its *promise, which it had not kept*. It would be the gainer by the incidental circumstance that the debtor had paid only what he justly owed his creditor or what he had escaped paying by obtaining a discharge in bankruptcy. Surely no such contingency was taken into mind or measured in fixing the amount of premiums demanded for the policy. That amount was ascertained by the standard tables relating to the probabilities of human life upon which life insurance companies anchor when they fix and determine the schedule of premiums to be exacted in the conduct of their business. We are, upon principle, prepared to agree with the English court in its conclusion in *Dalby v. India & London L. Ins. Co.*<sup>1</sup> Indeed, we think the doctrine of that case has been accepted in this State, and that both upon principle and authority we should say that the insurer is bound to fulfill its contract, valid in its inception, notwithstanding the debtor upon whose life it runs may have paid his creditor or obtained a discharge in bankruptcy therefrom.”<sup>2</sup> If a policy is effected by the creditor, either directly or indirectly, on the life of his debtor, and at the expense of the latter, under circumstances which show that the insurance was intended as a security or indemnity to the creditor, he is bound on payment of the debt to deliver up the policy.<sup>3</sup> And so where the policy is payable to the creditor upon the death of the debtor the

<sup>1</sup> 15 C. B. 365; 28 E. L. & E. 312.

<sup>2</sup> The court cites *Rawls v. Am. L. Ins. Co.*, 27 N. Y. 282; 36 Barb. 357; *St. John v. Am. Mut. L. Ins. Co.*, 13 N. Y. 31, and note at p. 41; *Olmstead v. Keyes*, 85 N. Y. 593.

<sup>3</sup> *Courtney v. Wright*, 2 Giff. 337; 6 Jur. (N. S.) 1283; 3 L. T. 433; 9 W. R. 153; *Holland v. Smith*, 6 Esp. 11.

legal representatives of the latter are entitled to the proceeds of the policy after payment of the debt and premiums, provided the premiums on such policy have been either paid by the debtor, or with his express or implied assent charged to him by the creditor.<sup>1</sup>

§ 398. **Liens on Insurance Money.** — The voluntary payment of premiums on a life insurance policy by a stranger confers upon the payor no interest in the policy.<sup>2</sup> Where the mortgagor of a policy of life insurance, however, became bankrupt, but continued until his death to pay the premiums, it was held that his legal personal representatives were entitled to a lien on the policy money for the amount of the premiums so paid with interest.<sup>3</sup> In England it is more common than in this country for life insurance policies to be mortgaged for debts, and numerous questions have there arisen as to liens on the insurance money. In *Leslie v. French*,<sup>4</sup> it was held that neither a stranger nor a part owner who pays the premiums on a policy of assurance, is entitled to any lien on the policy for those payments except under the following circumstances: 1. By a contract with the beneficial owner of the policy.<sup>5</sup> 2. By reason of the right of the trustees to an indemnity out of the trust property for money expended by them in its preservation.<sup>6</sup> 3. By subrogation to these rights of the trustees of some person who may have advanced money at

<sup>1</sup> *Morland v. Isaac*, 20 Beav. 389; 24 L. J. Ch. 840; 1 Jur. (N. S.) 989; *Bruce v. Garden*, 8 L. R. Eq. 430; 20 L. T. 1002; 17 W. R. 990; *ante*, § 244.

<sup>2</sup> *Burridge v. Rowe*, 1 Y. & C. C. C. 183.

<sup>3</sup> *Shearman v. British Empire, etc., Ins. Co.*, 14 L. R. Eq. 4; 41 L. J. Ch. 466; 26 L. T. R. 570; 20 W. R. 620.

<sup>4</sup> 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.

<sup>5</sup> *Aylwin v. Witty*, 30 L. J. Ch. 860; 9 W. R. 720.

<sup>6</sup> *Clack v. Holland*, 2 W. R. 402; 9 Beav. 262; *Gill v. Downing*, 17 L. R. Eq. 316; 30 L. T. 157; 22 W. R. 360; *Todd v. Moorhouse*, 23 W. R. 155; L. R. 19 Eq. 69.

their request for the preservation of the property. 4. By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to that charge any moneys which have been paid by them to preserve the property. Priorities of mortgagees and creditors are determined in cases involving the disposition of proceeds of life insurance policies as when other choses in action are involved. A verbal notice to an insurance company of an assignment of a policy is sufficient to give priority over subsequent assignees.<sup>2</sup> Where several incumbrances or liens exist on several policies the securities will be marshalled if necessary to do justice.<sup>3</sup>

§ 399. **Creditors as Beneficiaries of Members of Benefit Societies.** — The designation by a member of a benefit society of a person as his beneficiary, who is not of the class named in the charter or statutes authorizing the formation of such associations, is invalid, for the society has no power to provide for a fund for the benefit of any other persons than those mentioned in its charter or the statutes under which it exists.<sup>4</sup> But it has been said,<sup>5</sup> that, although the certificate of a mutual beneficiary association contains the name of a creditor of the member as the beneficiary, contrary to the charter, yet if the certificate, or laws of the society, recognize the right to a substitution or change of

<sup>1</sup> See cases cited last, *supra*.

<sup>2</sup> *North British, etc., Co. v. Hallett*, 7 Jur. (N. S.) 1263; 9 W. R. 880. For other cases involving notice to the company of assignment, see *Alletson v. Chichester*, 10 L. R. C. P. 319; 44 L. J. C. P. 153; 32 L. T. 151; 28 W. R. 393; *In re Hickey*, 10 Ir. R. Eq. 117—C. A.; *In re Currie*, 13 L. R. Eq. 188; 41 L. J. Bk. 55; 20 W. R. 363; *In re Russell*, 15 L. R. Eq. 26; 27 L. T. 706; 21 W. R. 97.

<sup>3</sup> *Ford v. Tynte*, 41 L. J. Ch. 758; 27 L. T. 304; *Heyman v. Dubois*, 13 L. R. Eq. 158; 41 L. J. Ch. 224; 25 L. T. 558.

<sup>4</sup> *Ante*, § 244.

<sup>5</sup> *Rice v. New England Mut. Aid Soc. (Mass.)*, 5 N. Eng. Rep. 816; 15 N. E. Rep. 624; *Rindge v. Same*, 15 N. East. Rep. 628.



beneficiary, and provide that if the member survives all the original or substituted beneficiaries, the insurance shall be for the heirs of such member, the whole contract is not thereby rendered invalid, but the administrator of the deceased member may recover the benefit. The great object of beneficiary associations is not to do a life insurance business as such and for profit, but incidentally, and for the purpose of protecting the families and dependents of their members. The benevolent feature predominates, although the member pays a consideration for the benefit to be paid to his widow or orphans or dependents. Consequently these societies were never intended to protect or benefit creditors of the members. If the charter or statutes of the State limit the beneficiaries of the members to those of their families, or relatives, or dependents, a creditor of a member can never have any right of action against the society.<sup>1</sup> If, though contrary to the laws of society, a certificate has been assigned to a creditor of the member and the society has paid over the amount to such creditor on the death of the member, he can only retain the amount of his debt, for security of which the assignment was made, together with the assessments paid by him on the certificate and interest, and must account to the personal representative of the deceased member for the surplus.<sup>2</sup>

**§ 400. Compliance with Terms of Policy as to Payment Relieves Insurer.** — Compliance with the terms of the contract in regard to payment of the insurance money will relieve the insurer from other claims upon the same policy. A case in point was decided in New Jersey.<sup>3</sup> There the policy provided that the sum therein named was

<sup>1</sup> *Skillings v. Mass. Ben. Assn.* (Mass.) 5 N. Eng. Rep. 718; 15 N. East. Rep. 566.

<sup>2</sup> *Levy v. Taylor*, 66 Tex. 652.

<sup>3</sup> *State (Metropolitan Life Ins. Co.) v. Schafer*, 50 N. J. L. 72; 9 Cent. Rep. 662; 11 Atl. Rep. 154.

to be paid as stated in condition five which was as follows: "The production by the company of this policy, and of a receipt for the sum assured, signed by any person furnishing proof satisfactory to the company that he or she is the beneficiary, or an executor or administrator, husband or wife, or relative by blood, or connection by marriage of the assured, shall be conclusive evidence that such sum has been paid to and received by the person or persons lawfully entitled to the same, and that all claims and demands upon said company under this policy have been fully satisfied." It was further stipulated that the policy and receipt book must be surrendered to the company before any payment could be claimed. In the application the insured stated that he wanted the benefit paid to his son. A daughter of the insured, however, produced to the company the policy and the premium receipt book, and the company paid her the money. In a suit by the son against the company to recover the amount the court held that the payment to the daughter relieved the company, because there was no contract or agreement to pay to the beneficiary named in the application, but to pay to the person or persons named in said condition five of the policy and in the manner therein specified. The company having paid in strict accordance with that condition was thereby discharged under its express terms from further liability. If the constitution of a benefit society provide that all claims against it shall be referred to the board of directors, "whose decision shall be final," no suit can be maintained on a death claim after it has been referred to the board of directors and payment thereof has been refused by it.<sup>1</sup> In the case cited, upon the facts as stated, the court said: "Waiving, therefore, all questions as to whether the board of directors would be under any more obligations to approve this claim

<sup>1</sup> *Rood v. Railway Passenger, etc., M. B. Assn.* (U. S. Cir. Ct. N. D. Ill.), 31 Fed. Rep. 62.

after a judgment had been rendered in favor of this plaintiff than before, it is sufficient to say that it seems clear to me that the sole power of determining whether the association should or should not pay a claim, and an assessment be ordered to pay it, is vested in this board of directors, and no court can review or re-examine their decision in that regard. The constitution says the action of the board shall be final and the courts must so treat it.”<sup>1</sup>

**§ 401. Conditions Precedent to Recovery to be Performed After Loss.**—In contracts of insurance certain things are usually to be done by the assured after a loss before he can recover, such as the giving of notice or furnishing prescribed proofs of death. The doing of these acts is a condition precedent to recovery of the insurer. It is not necessary that these conditions precedent consist of things to be done by the assured, though he is required to procure performance, for the insurer may stipulate that before he be held on his contract certain acts be done by third parties. An interesting case illustrative of this last statement, is that of *Fuller v. B. & O. Employés' Relief Assn.*, decided by the Court of Appeals of Maryland.<sup>2</sup> The defendant was a corporation, established by a railroad company, whose employés were required to become members of such corporation and to contribute to it certain amounts out of their wages. Members who might be injured in the service of the company, whether through the negligence of the company or not, were entitled to a certain sum. The constitution of the association provided that in all cases where death is the result of accident, before the association should pay the amount due to the beneficiary of

<sup>1</sup> It seems that on principle, if the claim had not been submitted to the board and an action had been brought, the court would have had jurisdiction, because an agreement to refer future disputes to arbitration, such as this contract was, is not binding. See *post*, § 450.

<sup>2</sup> 9 Cent. Rep. 82; 10 Atl. Rep. 237.

the member killed, the person legally entitled to recover damages should release the railroad company from all claim to damages. The member of the association designated his mother as beneficiary and was killed by an accident on the road. He left a wife and child who were legally entitled to recover damages from the railroad company if the death resulted from the negligence of the latter. Such wife and child did not release the railroad company, but sued it and recovered damages by compromise. In an action brought by the beneficiary to recover the benefit promised in the certificate, the court held that the provisions of the constitution referred to were reasonable and binding upon the members and their beneficiaries and that the meaning was that no recovery could be had by any person against the association if the person legally entitled to damages made a claim for damages against the railroad company.

§ 402. **No Liability *Civiliter* at Common Law for the Destruction of Human Life.** — At common law a party is not liable *civiliter* for the destruction of human life, whatever the consequences may be, or however clearly such a destruction may involve pecuniary damage. And although one may have contract relations with another he is not legally injured by an injury to such person which affects disastrously those relations. Where an insurer has been compelled to pay the insurance on the life of a person, whose death has been caused by the unlawful act of a third person, and where there is no privity of contract between the insurer and the wrong-doer, and no direct obligation of the latter to the former growing out of the relation of the wrong-doer to the insured, by contract or otherwise; though the loss of the insurer is due to the acts of the wrong-doer, yet as those acts affect the insurer only through his artificial relation of contractor with the insured, the loss is a remote and an indirect consequence of the act of the wrong-

doer, and no action therefor can be maintained against him by the insurer. It follows that where the insured is killed by the negligence of a railroad company<sup>1</sup> or by the willful act of an individual<sup>2</sup> no action can be maintained against the wrong-doer by an insurance company which has paid the amount of a policy upon the life of the deceased.

§ 403. **Conditions as to Notice and Proofs of Loss.** — The contract, whether contained in the policy of the ordinary life insurance company, or in the certificate, constitution and by-laws of a mutual benefit association, generally provides what shall be done by the assured upon the happening of the contingency insured against. It is competent for the parties to stipulate for such conditions as they please in regard to notice and proofs of loss,<sup>3</sup> although it has been held that a condition in a fire policy requiring a certificate or affidavit from the nearest magistrate, or a fire marshal, stating certain facts, is unreasonable and therefore void,<sup>4</sup> and if it is contracted that proofs of death "satisfactory to the directors" be furnished, together with such information as they "shall think necessary to establish the claim" the directors cannot capriciously demand unreasonable proof.<sup>5</sup> The most usual requirements are that as soon as possible after the loss, notice thereof shall be given to the company and that proofs of death be afterwards furnished. The loss is generally made payable a certain period after receipt of these formal proofs of loss. Whatever these requirements are, as we shall see, they must be complied with or the company will not be liable. Nothing less

<sup>1</sup> *Conn. Mut. Life Ins. Co. v. New York & N. H. R. R. Co.*, 25 Conn. 265.

<sup>2</sup> *Insurance Co. v. Brame*, 95 U. S. 754.

<sup>3</sup> *Fire Insurance Companies v. Felrath*, 77 Ala. 194.

<sup>4</sup> *Universal Fire Ins. Co. v. Block (Pa.)*, 1 Atl. Rep. 523; *Shannon v. Hastings M. F. Ins. Co.*, 26 U. Can. C. P. 380; 2 Ont. App. 81.

<sup>5</sup> *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782; 8 Jur. (N. S.) 506; 31 L. J. Q. B. 17; 5 L. J. (N. S.) 550.

than an act of God will excuse performance,<sup>1</sup> although in a fire case insanity was said to be an excuse,<sup>2</sup> and accident or mistake has been said to excuse.<sup>3</sup> But generally the conditions must be complied with, unless performance has been waived or the insurer is, by some act of his own, estopped from setting up the condition. If the policy is silent as to the effects of a failure to furnish proofs as required, while for violation of other conditions it expressly provides that the company shall be absolved from liability, such failure will not deprive insured of his rights.<sup>4</sup> There is a radical difference between the preliminary notice and the more formal proofs of loss. Notice will not be taken for proof, or supply its place, although the proofs of death may be deemed notice.<sup>5</sup>

§ 404. **Substantial Compliance with Conditions Sufficient.** — A substantial compliance with the terms of the contract in regard to notice and proofs of loss is all that is necessary. On this point the Supreme Court of North Carolina has well said: <sup>6</sup> “ Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But on the other hand, the insured are generally plain men, without counsel, or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases probably they never read. What they understand is

<sup>1</sup> *Gamble v. Accident Ass. Co.*, 4 Irish R. C. L. 204; *Patton v. Employer's, etc., Assn. Co.*, 20 L. R. (Ir.) 93; *Forest City, etc., Ins. Co. v. School Directors*, 4 Bradw. 145; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Fire Ins. Companies v. Felrath*, 77 Ala. 194.

<sup>2</sup> *Insurance Companies v. Boykin*, 12 Wall. 483.

<sup>3</sup> *Hawke v. Niagara, etc., Co.*, 23 Grant's Ch. Up. Can. 139.

<sup>4</sup> *Aurora F., etc., Co. v. Kranich*, 35 Mich. 289.

<sup>5</sup> *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169.

<sup>6</sup> *Willis v. Germania Ins. Co.*, 79 N. C. 285.

that they pay the insurers so much money, and if they are burnt out the insurers pay them so much. Where, therefore, there has been good faith on the part of the insured and a substantial compliance with the contract on their part, the courts will require nothing more." Though these words were spoken of fire insurance contracts they apply to life insurance cases as well, and the cases cited in the subsequent sections practically sustain this view.<sup>1</sup>

§ 405. **Notice of Loss.** — If notice of loss is required to be given "forthwith," or "immediately," or "as soon as possible," these words are not to receive a literal interpretation, for to do so would often be rank injustice. It is enough under such a condition to give notice within a reasonable time. What is a reasonable time depends upon the circumstances of each case and is usually a question of fact for the jury, or a mixed question of law and fact. If there is no dispute as to the facts the question is one of law for the court.<sup>2</sup> Thus notice within five days was held to be in time,<sup>3</sup> and, under peculiar circumstances, two months has been held not an unreasonable delay,<sup>4</sup> nor thirty days,<sup>5</sup> nor eleven weeks,<sup>6</sup> nor four months,<sup>7</sup> nor twenty-four days,<sup>8</sup>

<sup>1</sup> Hartford F. Ins. Co. v. Smith, 3 Colo. 422.

<sup>2</sup> Bennett v. Lycoming M. F. Ins. Co., 67 N. Y. 274; Swan v. Liverpool L. & G. Ins. Co., 52 Miss. 704; Brink v. Hanover F. Ins. Co., 80 N. Y. 108; Ben Franklin F. Ins. Co. v. Flynn, 98 Pa. St. 627; Provident L. Ins. Co. v. Baum, 29 Ind. 236; Railway Passengers' Ass. Co. v. Burwell, 44 Ind. 460; Lyon v. Railway Passengers' Ass. Co., 46 Ia. 631; Kimball v. Howard F. Ins. Co., 8 Gray, 33; Inman v. Western F. Ins. Co., 12 Wend. 452; Kingsley v. N. Eng. M. F. Ins. Co., 8 Cush. 393; Erwin v. Springfield, etc., Ins. Co., 24 Mo. App. 145.

<sup>3</sup> West Branch Ins. Co. v. Helfenstein, 40 Pa. St. 289; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; 20 Barb. 468; Schenck v. Mercer Co., etc., Ins. Co., 24 N. J. L. (4 Zab.) 447.

<sup>4</sup> Cashau v. Northwestern Ins. Co., 5 Biss. 476.

<sup>5</sup> Bennett v. Lycoming, etc., Ins. Co., 67 N. Y. 274.

<sup>6</sup> Brink v. Hanover F. Ins. Co., 80 N. Y. 108.

<sup>7</sup> Palmer v. St. Paul, etc., Ins. Co., 44 Wis. 201.

<sup>8</sup> Field v. Ins. Co., 6 Biss. 121.

nor a month.<sup>1</sup> But under different circumstances eleven days has been held unreasonable delay,<sup>2</sup> and eighteen days,<sup>3</sup> and a month,<sup>4</sup> and seven months, notwithstanding the company, from other sources, had notice of the loss.<sup>5</sup> Six days' delay was held unreasonable where the agent lived in the same town and there were no extenuating circumstances.<sup>6</sup> "It is evident," says the Supreme Court of Connecticut,<sup>7</sup> "from all the authorities that the words 'forthwith,' and 'immediately' are not to receive a strict literal construction. Some time must necessarily be given. Some cases require more time, some less. To undertake to say as matter of law what shall or shall not be regarded as reasonable time must necessarily be attended with great difficulty. Extreme cases either way may easily be determined. Between them there is a wide belt of debatable grounds, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact. The court in the present case very properly submitted it to the jury and we cannot say that the verdict was wrong. The notice called for required time to collect the facts and prepare a statement, and required time for investigation both by the insured and by the magistrate. Whether the time taken was reasonable or unreasonable was a question peculiarly within the province of the jury to determine." The requirement of notice is more common and necessary in fire policies than in those on lives, and most of the cases involving questions of notice are upon fire contracts. In life policies the amount is usually payable within a certain time

<sup>1</sup> *Parsons v. Queen Ins. Co.*, 43 Up. Can. Q. B. 271; 4 Ont. App. 103

<sup>2</sup> *Trask v. State F. Ins. Co.*, 29 Pa. St. 198.

<sup>3</sup> *Edwards v. Lycoming Ins. Co.*, 75 Pa. St. 378.

<sup>4</sup> *Scammon v. Germania Ins. Co.*, 101 Ill. 621.

<sup>5</sup> *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142.

<sup>6</sup> *Railway Passengers' Ass. Co. v. Burwell*, 44 Ind. 460.

<sup>7</sup> *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553.



after "due notice and proof of death" of the party insured, and the notice is not as essential an element. The custom generally is to informally notify the company of the death and receive from it blank forms to be filled up to serve for proof. In case of losses by fire there is greater need for timely notice, so that investigation may be made, for the loss may be partial and salvage result, but in life policies the death of the insured causes a total loss, which can be investigated as well later. Notice of loss need not be in writing unless the contract so requires,<sup>1</sup> and acting on an oral notice is waiver of a written notice,<sup>2</sup> and where two officers of the company went to the place where the loss occurred for the purpose of examining into it, it was held that notice was excused.<sup>3</sup> The notice must substantially conform to the conditions of the contract and be given by the person, to the officer and at the place and within the time required.<sup>4</sup> It may refer to affidavits filed with the company by the holder of another policy on the same life<sup>5</sup> and may be given to the agent for the company, unless otherwise required by the policy.<sup>6</sup> Although the notice is informal and contains much irrelevant matter, it is sufficient if it sets forth in substance the facts required and to this end it will be liberally construed.<sup>7</sup> If the

<sup>1</sup> *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

<sup>2</sup> *Edwards v. Travelers' Ins. Co.*, 20 Fed. Rep. 661; 22 Blatchf. 225; 122 U. S. 457.

<sup>3</sup> *Roumage v. Mechanics' Ins. Co.*, 13 N. J. L. 110.

<sup>4</sup> *Cornell v. Milwaukee, etc., Ins. Co.*, 18 Wis. 387; *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472; *Provident Ins. L. Co. v. Baum*, 29 Ind. 236; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Inland, etc., Co. v. Stauffner*, 33 Pa. St. 397; *Railway Pass., etc., v. Burwell*, 44 Ind. 460; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

<sup>5</sup> *Loomis v. Eagle L., etc., Ins. Co.*, 6 Gray, 396.

<sup>6</sup> *Commercial Union Ins. Co. v. State (Ind.)*, 15 N. East. Rep. 518; 13 West. Rep. 47.

<sup>7</sup> *Barker v. Phoenix Ins. Co.*, 8 Johns. 307; *Rix v. Mutual Ins. Co.*, 20 N. H. 198.

giving of a notice within a specified time is a condition precedent to recovery, it must be performed or the company is not liable. Thus it was said<sup>1</sup> that the provisions of a policy issued by an assurance company, making it a condition precedent to the right to recover that a notice, specifying the particulars of the accident should be delivered at the chief office of the company, in London, within seven days after its occurrence, applies to cases where, owing to the sudden character of the accident and its resulting in instantaneous death, there was nobody capable of giving the required notice, and the provision is not discharged by reason of the fact that owing to the act of God, the accident was of so sudden and fatal a character that it was impossible to have given the required notice within the specified time.

§ 406. **Proofs of Loss, by whom Made.** — The assured is the party by whom notice of loss must be given and proofs furnished.<sup>2</sup> But a notice from the agent of the company upon information received by him is sufficient, unless the policy provides otherwise.<sup>3</sup> In cases of fire insurance contracts the agent of the insured has been allowed to furnish the proofs of loss required,<sup>4</sup> and this is especially so where the company has previously, in effecting the insurance, recognized the agent as such.<sup>5</sup> The real party in interest has been allowed to give the notice and

<sup>1</sup> *Gamble v. Accident Ass. Co.*, 4 Ir. R. C. L. 204.

<sup>2</sup> *Stimpson v. Monmouth, etc., Ins. Co.*, 47 Me. 379; *Spaulding v. Vermont, etc., Ins. Co.*, 53 Vt. 156; *Stanton v. Home F. Ins. Co.*, 21 Low. Can. Jur. 211; *State Ins. Co. v. Maackens*, 38 N. J. L. 564.

<sup>3</sup> *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Sexton v. Montgomery, etc., Ins. Co.*, 9 Barb. 191.

<sup>4</sup> *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Ayres v. Hartford F. Ins. Co.*, 17 Ia. 176; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Sims v. State Ins. Co.*, 47 Mo. 54; *O'Connor v. Hartford Ins. Co.*, 31 Wis. 160; *McGraw v. Germania F. Ins. Co.*, 54 Mich. 145; *Graham v. Phoenix Ins. Co.*, 17 Hun, 156; *Findeisin v. Metropole F. Ins. Co.*, 57 Vt. 520.

<sup>5</sup> *Swan v. Liverpool L. & G. Ins. Co.*, 52 Miss. 704.

make proofs of loss,<sup>1</sup> as the assignee of a life policy.<sup>2</sup> In general, it may be said that the conditions in insurance policies are to be construed liberally in favor of the assured and with greater strictness to the insurer because the contract is prepared by him.<sup>3</sup> And so, although the policy required proofs and notice to be given by the assured and he was to give in a particular account and to submit to an examination by the company before the loss should be payable, an attaching creditor was allowed to furnish the preliminary evidence by depositions.<sup>4</sup> In this case the court said: "It does not appear that the claimant is bound to comply with these requirements with technical strictness, either as to the time or manner of compliance." Notice and proofs of loss may be furnished by a testamentary guardian of minor beneficiaries, although he has not qualified as such according to the laws of the State of his domicile, but payment cannot be made of the amount of the policy to such guardian, unless he has qualified as such according to law.<sup>5</sup> In benefit societies the laws generally provide for the furnishing of proofs of loss by the beneficiary and the local lodge of which the deceased was a member. There is little difference between the requirements of life insurance companies and benefit societies in this respect, and the same principles govern in both classes of contracts.<sup>6</sup>

<sup>1</sup> *Watertown Ins. Co. v. Grover*, 41 Mich. 131; *Northwestern Ins. Co. v. Atkins*, 3 Bush, 328; *Graham v. Firemen's Ins. Co. (C. C. N. Y.)*, 9 Rep. 285.

<sup>2</sup> *Cannon v. Northwestern M. L. Ins. Co.*, 29 Hun, 470.

<sup>3</sup> *Willis v. Germania Ins. Co.*, 79 N. C. 285; *Lockwood v. Middlesex Mut. Ass. Co.*, 47 Conn. 553; *ante*, § 404.

<sup>4</sup> *Northwestern Ins. Co. v. Atkins*, 3 Bush, 328.

<sup>5</sup> *Wuesthoff v. Germania L. Ins. Co. (N. Y.)*, 14 N. East. Rep. 811; 10 Cent. Rep. 500.

<sup>6</sup> *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Payne v. Mut. Relief Soc.*, 6 N. Y. St. Rep. 365; 17 Abb. N. C. 53; *Gellatly v. Minn. Odd Fellows', etc., Soc.*, 27 Minn. 215; *Kansas Prot. Union v. Whitt (Kan.)*, 14 Pac. Rep. 275; *Lazensky v. Supreme L. K. of H.*, 31 Fed. Rep. 592.

§ 407. **Forms and Contents of Proofs.** — It is not usual for life insurance policies, nor the by-laws of benefit societies, to prescribe, either the form or contents of proofs of loss, although many contracts do contain definite requirements upon his subject. The condition is simply that the money be payable in a certain time after “due proofs of death,” or “notice and proof of death.” Upon receipt of notice of death insurance companies, and generally benefit societies, send to the assured blank forms for execution, consisting of certain questions to be answered and sworn to by the assured, the physician attending the deceased in his last illness, the clergyman and undertaker officiating at the funeral, and a friend of the deceased. In benefit societies the lodge also usually certifies that the member was in good standing at the time of his disease, that a certain person is the lawful beneficiary and that the claim is just. If a policy of life insurance is payable in a certain time after “due notice and proof of the death,” this means such reasonable proof as will give assurance that the event has happened and will satisfy the rules of evidence, and what is due proof cannot be determined arbitrarily by the company, as, for example, that a physician’s certificate of the death be deemed an essential part of the proof, although the company has a usage to that effect. Such usage to be binding on the assured must be made known to him before issuance of the policy.<sup>1</sup> The requirements of the policy must, however, be substantially complied with, as, for example, where it was agreed in the policy that the company should not be liable for the loss, unless its surgeon-in-chief should be of the opinion that the party whose life was insured did not die from intemperance; it was held that this opinion of the surgeon-in-chief was a condition precedent to recovery and the assured must prove the decision of the surgeon as part of her

<sup>1</sup> *Taylor v. Aetna L. Ins. Co.*, 13 Gray, 434; *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169.

case, or account for its absence.<sup>1</sup> And so as to other certificates.<sup>2</sup> The information is the main thing to be regarded in proofs of loss, the form is not important.<sup>3</sup> Where only "due proof" is required it does not derogate from the sufficiency of the proofs that they disclose facts of which the insurer can avail himself as a defense to an action on the policy,<sup>4</sup> nor are such facts disclosed a bar to the bringing of a suit.<sup>5</sup> Where two or more policies are issued by the same company upon the same life calling for the same kind of proofs, it is enough, in the absence of a requirement to the contrary, to furnish proofs under one policy alone.<sup>6</sup> Nor is it necessary that the proofs of loss disclose the interest of the insured unless the policy so requires.<sup>7</sup> A requirement sometimes found in life insurance policies is that among the documents and certificates making up the proofs of death shall be the affidavit of the physician who was the "attending physician," in the last illness of the insured. A physician, not engaged in practice, who is present as a friend and neighbor when a wounded man is brought to his own house, and who at the request of another neighbor, examines the wounds and administers an opiate is not necessarily such an attending physician. At most it is a question for the jury.<sup>8</sup> And so with the question as to which one of several was the attending physician within the meaning of the policy.<sup>9</sup>

<sup>1</sup> *Campbell v. Am. Popular L. Ins. Co.*, 1 McArthur, 246.

<sup>2</sup> *Fire Ins. Companies v. Felrath*, 77 Ala. 194.

<sup>3</sup> *Irwin v. Springfield, etc., Ins. Co.*, 24 Mo. App. 145.

<sup>4</sup> *Ins. Co. v. Rodel*, 95 U. S. 237; *Conn. Mut. L. Ins. Co. v. Siegel*, 9 Bush, 450; *Conn. Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593.

<sup>5</sup> *Ins. Co. v. Rodel*, *supra*; *Life Ins. Co. v. Francisco*, 17 Wall. 672.

<sup>6</sup> *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Dakin v. Liverpool, etc., Ins. Co.*, 13 Hun, 122; 77 N. Y. 600.

<sup>7</sup> *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith, 268.

<sup>8</sup> *Gibson v. Am. Mut. L. Ins. Co.*, 37 N. Y. 580.

<sup>9</sup> *Cushman v. United States L. Ins. Co.*, 70 N. Y. 72; *Life Ins. Co. v. Francisco*, 17 Wall. 672.

§ 408. **To Whom and at What Place Proofs Must be Furnished.** — If the policy requires that proofs of loss be furnished at a certain place, or to a designated official, this condition must be complied with. An allegation that the proofs were delivered to the company, satisfies a requirement in the policy that they be given to the secretary.<sup>1</sup> If the contract provides that the insured, in case of loss, shall “deliver in” a particular account, etc., it is not sufficient to mail such account to the company, it must be shown that such account, etc., was received.<sup>2</sup> Delivery to an authorized agent is sufficient.<sup>3</sup> A condition that “any person other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the assured named in this policy, and not of this company,” is void as applied to a person, *i.e.*, a local agent, upon whose counter-signature the validity of the policy, by its terms, is made to depend.<sup>4</sup> It is doubtful whether such a condition, under any circumstances, can be made available as a defense for the company after a loss has happened.<sup>5</sup> An adjuster, sent to adjust the loss, has authority to receive proofs of loss,<sup>6</sup> or, if the company is foreign, proofs may be made to an agent.<sup>7</sup> If the policy requires delivery at the office of the company, a delivery to any officer in charge of such office is sufficient,<sup>8</sup> or to an agent of the insurer at the place of the loss by request of such agent.<sup>9</sup> Where the policy was conditioned that, in

<sup>1</sup> *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84.

<sup>2</sup> *Hodgkins v. Montgomery, etc., Ins. Co.*, 34 Barb. 213.

<sup>3</sup> *North British, etc., Ins. Co. v. Crutchfield*, 108 Ind. 518.

<sup>4</sup> *Idem.*

<sup>5</sup> *Idem.*; *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Partridge v. Commercial F. Ins. Co.*, 17 Hun, 95; *Indiana F. Ins. Co. v. Hartwell*, 100 Ind. 566.

<sup>6</sup> *Merchants', etc., Ins. Co. v. Vining*, 67 Ga. 661.

<sup>7</sup> *Ætna Ins. Co. v. Sparks*, 62 Ga. 187.

<sup>8</sup> *Edgerly v. Farmers' Ins. Co.*, 48 Ia. 644.

<sup>9</sup> *Badger v. Phoenix Ins. Co.*, 49 Wis. 396.

case of loss, "immediate notice shall be given in writing to the company at Hartford, stating, etc., with full particulars of the accident and injury, of which direct and affirmative proof shall be furnished within seven months from the happening of the accident," and failure to comply with this requirement was to avoid the policy, it was held that the condition requiring proofs to be furnished to the company, clearly does not require such proofs to be sent to the home office at Hartford.<sup>1</sup> In a case in Illinois,<sup>2</sup> the policy required that notice and proofs should be delivered to the company's secretary at the home office. They were served upon an agent in another place. The agent did not object to the service on the ground that it was not made at a proper place, but refused to receive the proofs on the ground that the policy had been cancelled. The court held that this refusal was a waiver of the right to insist upon service of the proofs at the home office. Proofs which were sufficient under the policy, as written, are good after it has been reformed so as to express the actual intention of the parties.<sup>3</sup>

**§ 409. When Company Refuses to Furnish Blank Forms.**—If the company, or society, when notified of the death and requested to furnish blank proofs of loss refuses to do so on the ground that the policy is void, or that it is not liable for the loss, such conduct will be held a waiver of proofs and they need not be supplied.<sup>4</sup> And where a by-law of the society provided that "proof of death shall be made on blanks furnished by the society, with the seal of the lodge to which the member belongs, or

<sup>1</sup> *Scheiderer v. Travelers' Ins. Co.*, 58 Wis. 13.

<sup>2</sup> *German Ins. Co. v. Ward*, 90 Ill. 550.

<sup>3</sup> *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

<sup>4</sup> *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 463; *Payne v. Mut. Relief Soc.*, 6 N. Y. St. R. 365; 17 Abb. N. C. 53.

of the nearest lodge to the deceased," it was held that upon the refusal of the society, on proper application, to furnish the blanks mentioned, proofs of death might be made without such blanks and need not bear the lodge seal.<sup>1</sup> If the delay in furnishing proofs of loss, or giving notice, is in any way attributable to the insurer, or caused by him, it will not be regarded.<sup>2</sup>

§ 410. **Effect of Failure to Furnish Proofs.** — If the effect of a failure to furnish proofs of loss in a reasonable time is not declared in the contract, they are in time if furnished before suit is brought.<sup>3</sup> But where the policy provides that the amount shall be payable after "due notice and proof thereof," no action can be maintained until after the notice is given and the required proof furnished; for the liability of the insurer does not become absolute unless the preliminary proof, as required by the conditions of the policy, is obtained. If no proof is furnished the liability does not attach.<sup>4</sup> An insurance company cannot, under the Maine statute, be charged as a trustee for loss or damage under the policy by trustee process by the mortgagee of the property damaged until the preliminary proofs of loss required by the policy have been furnished or waived.<sup>5</sup>

§ 411. **On Receipt of Proofs Insurer Must Point Out Defects, if any Exist, Within a Reasonable Time.** — When notice and proofs of loss are furnished to the insurer he must within a reasonable time point out the defects, if any,

<sup>1</sup> *Gellatly v. Minnesota Odd-fellows Mut. Ben. Soc.*, 27 Minn. 215.

<sup>2</sup> *Miller v. Hartford F. Ins. Co.*, 70 Ia. 704; 29 N. W. Rep. 411; *Georgia, etc., Ins. Co. v. Kinnier*, 28 Gratt. 88; *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Aurora, etc., Ins. Co. v. Kranich*, 36 Mich. 289; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Craighton v. Agricultural Ins. Co.*, 39 Hun, 319.

<sup>3</sup> *Farmers' Ins. Co. v. Frick*, 2 Cin. L. Bul. 16.

<sup>4</sup> *Davis v. Davis*, 49 Me. 282; *Jackson v. Southern, etc., Ins. Co.*, 36 Ga. 429; *Leadbetter v. Aetna Ins. Co.*, 13 Me. 265.

<sup>5</sup> *Nickerson v. Nickerson (Me.)*, 5 N. Eng. Rep. 798; 12 Atl. Rep. 880.



which they contain. As says the Supreme Court of Michigan: <sup>1</sup> “The law is well settled that when any defects are found in the proofs of loss, capable of being remedied if intelligibly pointed out, a failure by the underwriters to make known the difficulty, or call for the information omitted, when that is the infirmity, within a reasonable time, is deemed to be a waiver, and the rule is believed to be without exception, that the insurer must object seasonably, if at all. He must act in good faith, openly, frankly and distinctly, and make his objections known within a reasonable time.” <sup>2</sup> What is a reasonable time in which the insurer must point out defects in proofs of loss is a question of fact for the jury. On this point the Supreme Court of Alabama well says: <sup>3</sup> “What is a reasonable time, being a mixed question of law and fact, must always be submitted to the jury, under appropriate instructions. It must depend largely on attendant circumstances. In this case, the distance from the chief agency, the greater distance from the head office, reasonable time to learn all that could be known of the true facts, and to formulate an opinion upon them — each and all of these must be taken into account in prosecuting the inquiry of reasonable time. Like other rules of law, it rests on reason. Insurance companies must not lure their patrons into false security, by which

<sup>1</sup> *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423.

<sup>2</sup> *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *American L. Ins. Co. v. Mahone*, 56 Miss. 180; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Timayenis v. Union Mut. L. Ins. Co.*, 21 Fed. Rep. 223; 22 Blatchf. 405; *Continental L. Ins. Co. v. Rogers (Ill.)*, 10 N. E. Rep. 242; 8 West Rep. 88; *Findeisen v. Metropole F. Ins. Co.*, 57 Vt. 520; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *McMasters v. Westchester, etc., Ins. Co.*, 25 Wend. 379; *Boynton v. Clinton, etc., Ins. Co.*, 16 Barb. 254; *Blake v. Exchange, etc., Ins. Co.*, 12 Gray, 265; *Bartlett v. Union Mut. Ins. Co.*, 46 Me 500; *Lycoming F. Ins. Co. v. Dunmore*, 75 Ill. 14. The foregoing are some only of the cases supporting the principle which is so universally admitted that citations are almost useless.

<sup>3</sup> *Fire Ins. Companies v. Feltz*, 77 Ala. 201.

the latter may lose the means and opportunity of remedying defects in their preliminary proof — must not lead them astray by giving notice of one objection, and then relying upon another; nor by a general refusal to pay, retain in reserve, for a surprise on the trial, some defect in the proof, which, perchance, if known might have been remedied. The law expects and exacts candor and good faith, and punishes with adverse presumptions those who fail to observe these cardinal virtues.”<sup>1</sup> Objections to the proofs are too late if not made until the trial.<sup>2</sup>

**§ 412. Objections to Proofs must be Specific: Insurer must not Mislead Assured.** — Objections by the insurer to the proofs of loss must be specific. It is too general to say that they are deficient both in form and substance,<sup>3</sup> or that they do not correspond to printed instructions;<sup>4</sup> nor can the company remain silent for a long period and then complain in general terms,<sup>5</sup> nor is it sufficient to merely say that the proofs are “irregular, informal and insufficient.”<sup>6</sup> Defects not specifically pointed out are waived.<sup>7</sup> Nor must the company mislead the insured by propositions of compromise on other grounds of alleged violation of conditions,<sup>8</sup> or by prolonging negotiations until the time to furnish proofs

<sup>1</sup> *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423.

<sup>2</sup> *Swan v. Liverpool, etc., Ins. Co.*, 52 Miss. 704; *Breckinridge v. American Central Ins. Co.*, 87 Mo. 62; *Organ v. Hibernia F. Ins. Co.*, 3 Mo. App. 576; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 10 N. E. Rep. 242; 8 West. Rep. 88; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Grant's Ch. (Up. Can.) 418. But see *Mason v. Andes Ins. Co.*, 25 Up. Can. C. P. 37; *McManus v. Ætna Ins. Co.*, 6 Allen (N. B.), 314.

<sup>3</sup> *Myers v. Council Bluffs Ins. Co. (Ia.)*, 33 N. W. Rep. 453.

<sup>4</sup> *Universal F. Ins. Co. v. Block (Pa.)*, 1 Atl. Rep. 523.

<sup>5</sup> *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13.

<sup>6</sup> *Madsden v. Phoenix Ins. Co.*, 1 S. C. 24.

<sup>7</sup> *Boynton v. Clinton & Essex Mut. Ins. Co.*, 16 Barb. 254; *Hartford Protection F. Ins. Co. v. Harmer*, 2 Ohio St. 452; *Peoria, etc., Ins. Co. v. Lewis*, 18 Ill. 553; *Phoenix Ins. v. Tucker*, 92 Ill. 64. But see *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551.

<sup>8</sup> *Ben. Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627.

has expired.<sup>1</sup> If payment is withheld on other grounds than defects in the proofs, such defects will not be regarded and cannot be of avail to the insurer.<sup>2</sup> In receiving proofs, however, the insurer may place his disclaimer upon any ground he pleases and still, by express declaration to that effect, reserve all objections to a recovery in any form and to the proofs as furnished.<sup>3</sup> And if no word or act has been said or done by the insurer to mislead insured or throw him off his guard, mere silence is not enough to sustain the inference of waiver;<sup>4</sup> and this is particularly the case if proofs have been received at a later time than is provided, for, under such circumstances, the insurer is not precluded from his objections by retaining the proofs and keeping silent.<sup>5</sup> The company will not be precluded from insisting upon defects in the proofs if at the time of reception it indicated to insured the intention to hold him strictly to the terms of the policy in this respect.<sup>6</sup>

§ 413. **Where Proofs are Unnecessary.** — No proofs of loss are necessary if the company disclaims all liability un-

<sup>1</sup> *Little v. Phoenix Ins. Co.*, 123 Mass. 380.

<sup>2</sup> *Aetna Ins. Co. v. Shryer*, 85 Ind. 362; *Atlantic Ins. Co. v. Manning*, 3 Colo. 224; *Hartford F. Ins. Co. v. Smith*, *Id.* 422; *Williamsburg City, etc., Ins. Co. v. Cary*, 83 Ill. 453; *Phoenix Ins. Co. v. Tucker*, 92 *Id.* 64; *Continental Ins. Co. v. Randolph*, 2 Ky. L. Rep. 313; *Planters' Ins. Co. v. Engle*, 52 Md. 468; *Butterworth v. Western Ass. Co.*, 132 Mass. 489; *Am. L. Ins. Co. v. Mahone*, 56 Miss. 180; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108; *Field v. Ins. Co.*, 6 Biss. 121; *Miller v. Alliance, etc., Ins. Co.*, 19 Blatch. 308; 7 Fed. Rep. 649; *Bang v. Farmville, etc., Ins. Co.*, 1 Hughes, 290; *Merchants' Ins. Co. v. Dwyer*, 1 Posey, 441; *Walsh v. Vermont, etc., Ins. Co.*, 54 Vt. 351. See *post*, § 435, *et seq.*

<sup>3</sup> *Citizens' F. Ins. Co. v. Doll*, 35 Md. 89.

<sup>4</sup> *Mueller v. Southside F. Ins. Co.*, 87 Pa. St. 399; *St. Amand v. La. Cie d'Assurance, etc.*, 9 Queb. L. R. 162.

<sup>5</sup> *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Lycoming F. Ins. Co.*, 19 Hun, 238; *McDermott v. Lycoming F. Ins. Co.*, 12 Jones & Sp. 221.

<sup>6</sup> *Gauche v. London, etc., Ins. Co.*, 4 Woods, 102; 10 Fed. Rep. 347.

der the contract.<sup>1</sup> Probably no rule of insurance is better settled than this, and the reason rests on the old maxims, *Lex non præcipit inutilia, quia inutilis labor stultus*, and *Lex neminem cogit ad vana seu inutilia peragenda*. And so, when the insurer declines to pay the loss, and assigns a reason other than want of proofs, as, for example, the non-payment of an assessment, then proofs of loss are excused. This rule also has never been denied.<sup>2</sup> Many other acts and circumstances will be construed to amount to a waiver of proofs of loss or of any defects which might, under other conditions, be taken advantage of. This subject will be further treated of in the succeeding chapter.<sup>3</sup>

§ 414. **Good Standing.**—The majority of certificates issued by benefit societies contain the condition that the beneficiary shall only be entitled to recover if the deceased at the time of his death was in “good standing” in the order. It therefore often becomes a question of importance

<sup>1</sup> *Marston v. Mass. Mut. L. Ins. Co.*, 59 N. H. 92; *King v. Hekla F. Ins. Co.*, 58 Wis. 508; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696; *Carson v. German Ins. Co.*, 62 Ia. 433; *Phoenix Ins. Co. v. Adams*, 8 Ky. L. Rep. 532; *Aurora F., etc., Ins. Co. v. Kranich*, 36 Mich. 289; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *German-Am. Ins. Co. v. Davidson*, 67 Ga. 11; *Baile v. St. Joseph, etc., Ins. Co.*, 73 Mo. 371; *Kantrener v. Penn. M. L. Ins. Co.*, 5 Mo. App. 581; *Penn. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Crawford Co., etc., Ins. Co. v. Cochran*, 88 Pa. St. 230; *Sheppard v. Peabody Ins. Co.*, 21 W. Va. 368; *Kans. Prot. Union v. Whitt (Kan.)*, 14 Pac. Rep. 275; *Lazensky v. Sup. Lodge K. of H.*, 31 Fed. Rep. 592.

<sup>2</sup> *Carson v. German Ins. Co.*, 62 Ia. 433; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362; *Merchants', etc., Ins. Co. v. Vining*, 68 Ga. 197; *Goodwin v. Mass. Mut. Ins. Co.*, 73 N. Y. 480; *Marston v. Mass. L. Ins. Co.*, 59 N. H. 92; *Prentice v. Knickerbocker L. Ins. Co.*, 77 N. Y. 483; *Grange Mill Co. v. Western Ass. Co.*, 118 Ill. 396; *Boyd v. Cedar Rapids Ins. Co.*, 70 Ia. 325; 30 N. W. Rep. 585; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *West Rockingham M. F. Ins. Co. v. Sheets*, 26 Gratt. 854; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *Taylor v. Merchants' Ins. Co.*, 9 How. 390.

<sup>3</sup> *Post*, §§ 435, 436.

to determine what is meant by this expression. The certificate issued to the member is evidence of his good standing and in the absence of proof to the contrary this condition will be presumed to continue. If by reason of his conduct or failure to comply with the regulations or requirements of the society, the member has lost his good standing, the society must show this fact, for *status* once fixed is supposed to continue until the contrary is shown, — the fact is one of defense and is one peculiarly within its knowledge.<sup>1</sup> It was held in a case in Illinois,<sup>2</sup> that the words, good standing, are to be construed in reference to the language of the application and the preceding language of the certificate, and in that particular instance they meant that the member must not only have a good reputation but be of good conduct, — *i. e.* free from a violation of his pledge of total abstinence. “Good standing in a society,” says the court, “not only implies that a party is a member of the society, but that he has a good reputation therein.” And in this case the court, upon construing the contract, held that there was a pledge upon the part of the member that he would not use any intoxicating liquor; that the violation of this pledge was cause for expulsion or suspension as a member, and it, — not the expulsion or suspension, but the violation of the pledge, — was also a cause for forfeiture of rights and benefits under the certificate. Consequently, if before his death the member had violated his pledge, although he had not been tried or expelled for the offense, he was not in good standing.<sup>3</sup> A member of an order at the time of his death in arrears for dues and assessments, the time for the collection of which had fully expired, is by rea-

<sup>1</sup> Supreme Lodge K. of H. v. Johnson, 78 Ind. 110; Mulroy v. Sup. Lodge Knights of Honor, 28 Mo. App. 463; Ziegler v. Mut. Aid Soc., 1 McGloin (Ia.), 284.

<sup>2</sup> Royal Templars of Temperance v. Curd, 111 Ill. 289.

<sup>3</sup> See also Hogins v. Sup. Council Champions of the Red Cross (Cal.), 18 Pac. Rep. 125.

son of these facts not in good standing within the meaning of a benefit certificate requiring the member to be in good standing in the order at the time of his death to entitle the beneficiary to recover.<sup>1</sup> Where dues were payable in advance at the first meeting of the lodge in the quarter it was held that the member was in good standing and not in arrears although he had not paid his dues for the quarter, he dying August 12th and the quarter commencing on the first of the same month, if no intervening meeting of the lodge was shown.<sup>2</sup> If the laws of the order provide that members in arrears shall be suspended, the standing of such members is not affected until such suspension is regularly made.<sup>4</sup> In a case in the Federal court of Illinois, where the certificate contained a condition that the amount should only be paid if the member at the time of his death was in good standing in his lodge, the court said:<sup>3</sup> "I think this case might be wholly disposed of on the ground that this being a voluntary society, in which the standing of its members and the mode of suspending and reinstating them in their membership was regulated and provided for by the laws of the society, if the records and proceedings of the body show that a member is not in good standing, he must be bound by these records and the action of his society in that regard, especially when he has exercised his right of appeal, and the action of which he complains has been affirmed by the appellate tribunal. The society, by its own laws, being made the judge of the standing of its members, such members are bound by its action on that subject, and I feel very clear that the courts ought not to entertain revisionary supervision over the action of such bodies when dealing with their members, except, perhaps, when fraud is charged and proven." But this declaration must be taken with

<sup>1</sup> *McMurry v. Supreme Lodge K. of H.*, 20 Fed. Rep. 107.

<sup>2</sup> *Mills v. Rebstock*, 29 Minn. 380.

<sup>3</sup> *District Grand Lodge v. Cohn*, 20 Bradw. 335.

<sup>4</sup> *Hawkshaw v. Supreme Lodge K. of H.*, 29 Fed. Rep. 773.

some degree of allowance, for it is to be modified by the further statement that these proceedings of the subordinate lodge must have been regular and the lodge must have acquired jurisdiction. The rule is more correctly stated by Judge Wheeler, of the United States court for the Southern District of New York, in a suit against the same order and involving to a great extent the same question.<sup>1</sup> After referring to certain cases cited by counsel<sup>2</sup> the judge says: "These cases show clearly that the decisions of such associations, according to their own laws, rules, and regulations, which all assent to who become members, are conclusive as to membership and standing, except as they are reviewable within the order under the laws of the order. But none of the cases go so far as to hold that a mere record of a sentence of suspension, without any proceedings whatever to found it upon and not according to the laws of the order is conclusive anywhere. Section two of article twelve of the laws of this order requires that charges preferred against a member shall be read in open lodge, and a copy of them be furnished to him under the seal of the lodge, and that he be cited to appear to answer them. In *Karcher v. Supreme Lodge*,<sup>3</sup> the charge was non-payment of an assessment, and the copy furnished was not under the seal of the lodge. The validity of the judgment of suspension was questioned on the ground that the copy was not sufficient, but it was held that such irregularity would not invalidate the judgment, but not intimated that it would be good without any notice."<sup>4</sup>

<sup>1</sup> *Lazensky v. Supreme Lodge, K. of H.*, 31 Fed. Rep. 592.

<sup>2</sup> *Karcher v. Supreme Lodge K. of H.*, 137 Mass. 368; *Anacosta Tribe v. Murbach*, 13 Md. 91; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Burt v. Grand Lodge*, 44 Mich. 208; *Woolsey v. Odd-fellows*, 61 Ia. 492; 16 N. W. Rep. 576; *Harrington v. Workingmen's Assn.*, 70 Ga. 340.

<sup>3</sup> 137 Mass. 368.

<sup>4</sup> See *Mulroy v. Supreme Lodge Knights of Honor*, 28 Mo. App. 463.

## CHAPTER XIII.

### WAIVER AND ESTOPPEL.

- § 420. Definitions of Waiver and of Estoppel.
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- 422. Waiver may be Parol though Required by the Contract to be in Writing.
- 423. Waiver must be Intentional and with Knowledge.
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- 435. Calling for Proofs of Loss Waives Breach of Conditions.
- 436. Other Acts of Insurer in Regard to Proofs of Loss Amounting to Waiver of Particular Requirements.
- 437. When Insurer is Precluded from Certain Defenses.

§ 420. Definitions of Waiver and of Estoppel. — Waiver has been defined to be “the relinquishment or refusal to accept of a right.”<sup>1</sup> Estoppel is: “The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights

<sup>1</sup> Bouvier Law Dic., tit. Waiver.



which he cannot be allowed to call in question.”<sup>1</sup> “The law of estoppel,” says Bigelow,<sup>2</sup> “is the law of rights acquired or fixed in one of three ways, namely, by record, by deed, or by facts *in pais*.” In insurance cases, if an estoppel exists it is generally by matter *in pais*, though a company may become estopped both by deed and by record. Technically an estoppel *in pais* arises from the acts, admissions or conduct of a person by which he designedly induces another to alter his position injuriously to himself. The approved rule laid down by the authorities<sup>3</sup> is that to constitute an estoppel by conduct, or equitable estoppel, the following elements must be present: 1. There must have been a false representation or concealment of material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party would act upon it. 5. The other party must have been induced to act upon it. Equitable estoppel, or by conduct, is said to have its foundation in fraud, considered in its most general sense; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be tantamount to a fraud upon the person who had subsequently acquired the right.<sup>4</sup> The doctrine originated in chancery, but is now adopted in courts of law.<sup>5</sup> After treating of estoppels arising out of representations, including therein cases of silence amounting to a representation by way of admission or negation of rights, Mr. Bigelow, in his treatise on estoppel, says:<sup>6</sup> “There are other estoppels, so called, growing out of con-

<sup>1</sup> Bouvier Law Dic., tit. Estoppel.

<sup>2</sup> Estoppel, p. 1.

<sup>3</sup> Bigelow on Estoppel, p. 25.

<sup>4</sup> Bispham Equity, § 282.

<sup>5</sup> Note to Dutchess of Kingston's Case, 2 Smith Lead. Cas. 711.

<sup>6</sup> p. 633.

duct of the same nature, that cannot be considered cases of representation at all in any legitimate sense of that term. Such are cases in which, by the course of conduct of one party to a contract, entitled to the performance of certain terms or conditions thereof, the other party has been led to believe, as a man of average intelligence, that such performance will not be required, until it has become too late to perform, or until to insist upon performance, would work material injustice. These commonly are cases of waiver; and it appears to be little, if anything, more than giving them another name to call them estoppels. The estoppel, unlike that by misrepresentation, does not rest upon ignorance of the facts by the party entitled to the benefit of it. Frequent illustrations of the estoppel in question are to be found in actions upon insurance policies, where the conduct of the underwriter has been such as reasonably to lead the insured to believe, until too late, that a requirement of the policy, as, *e.g.*, in regard to the proofs of loss or the prompt payment of the premium or of a premium note will not be required. If the assured as a sensible man has really been misled, it would be a fraud upon him to insist upon the term or condition forborne."

§ 421. **In Insurance Law Waiver and Estoppel much the Same Thing.** — It will be seen from an examination of the cases cited in this chapter, as well as from the preceding sections, that if the words, waiver and estoppel, as used in insurance cases, are not synonymous terms, the line of separation between them is so shadowy and uncertain that it cannot always be distinguished. In his admirable work on Insurance Mr. May says:<sup>1</sup> "The terms, 'estoppel' and 'waiver,' though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application,

<sup>1</sup> § 505.

that they are used indiscriminately by the courts." The Supreme Court of Pennsylvania has remarked<sup>1</sup> that a waiver of a breach of conditions "never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it." And Bigelow says:<sup>2</sup> "Another kind of estoppel by conduct may arise, to wit, by a party to a contract or transaction inducing the other to act in the belief that the former will *waive* certain rights he might otherwise maintain against the latter. This estoppel does not consist in misrepresentation by the party to be estopped, nor does it require that the opposite party should be ignorant of the facts. Waiver by an underwriter of the terms of an insurance contract is an example." We shall not, therefore, in the succeeding pages attempt to distinguish between cases of waiver and those of estoppel, because if attempted it could not always be done. It will be readily seen that the same facts may be construed both to amount to the waiver of a right, otherwise enforceable, and to estop the party from asserting such right as a defense. What name to give to the legal effect of a certain condition of facts often depends upon the point of view from which such facts are regarded.

**§ 422. Waiver may be Parol Though Required by the Contract to be in Writing.**—A parol waiver of a condition in a policy is good, notwithstanding a provision in such policy that nothing but a written agreement, signed by an officer of the company shall have that effect. Such a requirement may be waived by parol, or acts *in pais*.<sup>3</sup>

<sup>1</sup> Diehl v. Adams, etc., Ins. Co., 58 Pa. St. 443.

<sup>2</sup> Bigelow on Estoppel, p. 27.

<sup>3</sup> Gans v. St. Paul, etc., Ins. Co., 43 Wis. 108; Farmers', etc., Ins. Co. v. Gargett, 42 Mich. 293; Blake v. Exchange M. Ins. Co., 12 Gray, 265; Van Allen v. Farmers', etc., Ins. Co., 4 Hun, 413; Lamberton v. Conn. F. Ins. Co. (Minn.), 39 N. W. Rep. 76; Smith v. Commercial Union Ins. Co., 33 Up. Can. Q. B. 69.

§ 423. **Waiver Must be Intentional and with Knowledge.**—A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule where there is a direct and precise agreement to waive the stipulation. *A fortiori* is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an agreement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show, not only his own understanding, but that the other party had the same understanding.<sup>1</sup> And the New York Court of Appeals in approving this rule says:<sup>2</sup> “Ordinarily a party should not be held to have waived a forfeiture, in the absence of facts constituting an estoppel, unless he intended to waive it, nor can he be held to have waived it unless he knew of the facts constituting after the forfeiture.”<sup>3</sup> Consequently acts of either party done after the time the other party claims to have been misled, are no ground of estoppel.<sup>4</sup> Intimations of legal conclusions, either by acts or words, constitute no foundation for an estoppel.<sup>5</sup>

§ 424. **No Estoppel when Contract is Illegal, nor when Parties made a Mutual Mistake, Nor when Party has not been Misled; Estoppel when Contract is Executed.**—A contract of insurance entered into in violation of law or

<sup>1</sup> *Bennecke v. Insurance Co.*, 105 U. S. 359; *Darnley v. London, Chatham & Dover R. Co.*, L. R. 2 H. L. 43.

<sup>2</sup> *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541.

<sup>3</sup> *Girard, etc., Ins. Co. v. Hebard*, 95 Pa. St. 45; *Diehl v. Adams, etc., Ins. Co.*, 58 Pa. St. 443; *Hazard v. Franklin Mut. F. Ins. Co.*, 7 R. I. 429; *Ryan v. Springfield, etc., Ins. Co.*, 46 Wis. 671.

<sup>4</sup> *Behrens v. Germania F. Ins. Co.*, 64 Ia. 19.

<sup>5</sup> *Packard v. Conn. Mut. L. Ins. Co.*, 9 Mo. App. 469; *Brewster v. Striker*, 2 N. Y. 19.

public policy is simply void and neither party to it is estopped from showing the fact. "Otherwise the public law and policy would be at the mercy of individual interest and caprice."<sup>1</sup> There is no estoppel where both parties with equal opportunities or knowledge on the subject made a mistake,<sup>2</sup> nor when the insured has not acted upon the supposed waiver<sup>3</sup> nor when the insured has not been prejudiced;<sup>4</sup> for, says the Supreme Court of Michigan:<sup>5</sup> "The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it, to an extent that renders it a fraud to recede from what the party has been induced to expect. It is only enforced to prevent fraud." If an association assumes a name which implies a corporate body, exercises corporate powers, performs acts and contracts as a corporation, it will be estopped to deny that it is a corporation and liable as such.<sup>6</sup> In an action on a certificate, purporting to be signed by the officers of the corporation and sealed with its seal, certifying that the member to whom the certificate was issued "is a member of this order in" a certain lodge, the corporation is estopped by its own deed from showing that at the time of the issue of the certificate the lodge was not fully organized.<sup>7</sup> The court says: "Conceding the organization

<sup>1</sup> *In re Comstock*, 3 Sawy 228; *Spare v. Home Ins. Co.*, 8 Sawy. 618; 15 Fed. Rep. 707.

<sup>2</sup> *Johnson v. Conn. F. Ins. Co.* (Ky. Ct. App.), 8 Ky. L. Rep. 460; 2 S. W. Rep. 151.

<sup>3</sup> *Andrews v. Aetna L. Ins. Co.*, 85 N. Y. 335; *Henry v. Gilliland*, 103 Ind. 177.

<sup>4</sup> *Jewett v. Home Ins. Co.*, 29 Ia. 562; *Security Ins. Co. v. Fay*, 22 Mich. 467.

<sup>5</sup> *Security Ins. Co. v. Fay*, *supra*.

<sup>6</sup> *Barbaro v. Occidental Grove, etc.*, 4 Mo. App. 429; *United States Ex. Co. v. Bedbury*, 34 Ill. 466; *Stoddard v. Onondaga Ann. Conference*, 12 Barb. 573.

<sup>7</sup> *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625; 11 West. Rep. 701; 14 N. East. Rep. 42.

of the Rising Star Lodge to have been defective as claimed, it would have afforded no answer to the action. It had received its charter, and, as a body, was acting under it with the knowledge and sanction of the defendant. This was sufficient to bind the latter."

§ 425. **Estoppel from Representations.** — An estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact, — to a present or past state of things. If the representation relate to some thing to be afterwards brought into existence, it will amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge. The only case in which a representation as to the future can be held to operate as an estoppel is where it relates to an intended abandonment of an existing right, and is made to influence others, and by which they have been induced to act. An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made with party complaining. The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the per-

son with whom he is dealing. For compliance with arrangements respecting future transactions parties must provide by stipulations in their agreements when reduced to writing.<sup>1</sup>

§ 426. **Waiver or Estoppel by Acts of Officers or Agents.** — A party always has the option to waive a condition or stipulation made in his own favor. Insurance companies therefore have this right, but as they are corporations they must act, if at all, through agents. The principal managing officers in charge of the business of a company, and acting within the apparent scope of their employment, may waive or dispense with any of the conditions of a policy of insurance, except, perhaps, as we shall see, in the case of a mutual company the powers of whose officers are said to be more limited. The knowledge of the president of a company is that of the company,<sup>2</sup> and where the secretary of an insurance company fills out an application, the company is presumed to waive any statements of fact that are not inserted in the application and not called for.<sup>3</sup> The assistant secretary has been held to have authority to waive forfeitures.<sup>4</sup> And generally the acts of the president and secretary of a company, performed in its office and relating to its business, whether they are written or verbal, whether they make a contract, waive a forfeiture or give consent, bind the company,<sup>5</sup> otherwise there would be no safety for any person dealing with the company, for it could avoid the acts of its officers or not as it would be to its advantage. The company can also, of course, waive

<sup>1</sup> *Insurance Co. v. Mowry*, 96 U. S. 544; *Waynshoro Ins. Co. v. Conover*, 98 Pa. St. 384; *White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159.

<sup>2</sup> *Pomeroy v. Rocky Mountain, etc., Ins. Co.*, 9 Colo. 295

<sup>3</sup> *Tiefenthal v. Citizens', etc., Ins. Co.*, 53 Mich. 306.

<sup>4</sup> *Piedmont, etc., Ins. Co. v. McLean*, 31 Gratt. 517.

<sup>5</sup> *Dilleber v. Knickerbocker Life Ins. Co.*, 76 N. Y. 567; 7 Daly, 540; *Cotton States Ins. Co. v. Edwards*, 74 Ga. 220.

any conditions through its duly authorized agent or a general agent. The question has frequently arisen as to the authority of insurance agents to waive for, or estop, their principals. If the agent is one with limited authority and not authorized, or expressly forbidden, to waive any conditions of the contract, and these instructions and limitations are communicated to the person dealing with such agent, or if by ordinary prudence he could have informed himself of them, the company will not be bound by the agent's acts.<sup>1</sup> If the agent willfully attempts a fraud upon the company, as by writing down false answers in the application, and the person dealing with him connives at the fraud either from negligence or design, the company will not be bound.<sup>2</sup> But if no limitation upon the power of the agent be brought to the notice of the assured, who acts in good faith, and he is deceived by the acts of the agent acting within the apparent scope of his employment, the company must respond, for it is at fault in holding out such agent as its representative.<sup>3</sup> And generally it may be said that the fraud or mistake of a knavish or blundering agent, done within the scope of his powers, will not enable the company to avoid a policy to the injury of assured, who innocently became a party to it, though a stipulation in the policy provides that such agent shall be deemed the agent of the insured and the

<sup>1</sup> *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Ins. Co. v. Norton*, 96 U. S. 240; *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; *Merserau v. Phoenix Mut. Life Ins. Co.*, 66 N. Y. 274; *Greene v. Lycoming F. Ins. Co.*, 91 Pa. 387; *Piedmont v. Arlington Life Ins. Co. v. Young*, 58 Ala. 476; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278.

<sup>2</sup> *Ryan v. World Life Ins. Co.*, 41 Conn. 168; *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100; *ante*, § 152, *et seq.*

<sup>3</sup> *Insurance Co. v. Wilkenson*, 13 Wall. 222; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; *New York L. Ins. Co. v. McGowan*, 18 Kan. 300; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Kausal v. Minnesota, etc., Ins. Co.*, 31 Minn. 17; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *American L. Ins. Co. v. Mahone*, 56 *Id.* 180; *Rohrback v. Aetna Ins. Co.*, 62 N. Y. 613; *Miller v. Mutual Ben. L. Ins. Co.*, 31 Ia. 216; *Knox v. Lycoming F. Ins. Co.*, 50 Wis. 671.



statements of the application, signed by the latter, are made warranties by the policy.<sup>1</sup> The stipulations of a policy, limiting the power of agents to waive its conditions, are not always conclusive upon either the assured or the company, because it is the privilege of the company to change or dispense with the conditions made for its benefit; it may enlarge the powers of its agents or ratify their acts. The question has been said to be not what power the agent actually had, but what power did the company hold him out to the public as possessing.<sup>2</sup> If the policy contain no limitations upon the power of the agent to waive any of its conditions, the company will be bound by his acts in that regard.<sup>3</sup> If the agent mislead an ignorant person as to material matters the company cannot profit by the wrong, but will be estopped.<sup>4</sup> A general agent has power, unless specially restricted by limitations and instructions communicated to parties dealing with him, to waive or dispense with any of the conditions of the policy. And the company is liable for all acts done by him in the course of his employment. He may waive conditions either in writing or verbally.<sup>5</sup> A foreign insurance company is chargeable with the knowledge of its general agent concerning the customs of his office and those under him.<sup>6</sup> Members of mu-

<sup>1</sup> *Eilenberger v. Protective Ins. Co.*, 89 Pa. St. 464; *Smith v. Farmers', etc., Ins. Co.*, 89 Pa. St. 287; *N. Y. Life Ins. Co. v. McGowan*, 18 Kan. 300; *ante*, § 152, *et seq.*; *post*, § 428.

<sup>2</sup> *Electric L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Willcuts v. N. W. Mut. L. Ins. Co.*, 81 Ind. 300.

<sup>3</sup> *Silverberg v. Phoenix Ins. Co.*, 67 Cal. 36.

<sup>4</sup> *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

<sup>5</sup> *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *N. Y. Life Ins. Co. v. McGowan*, 18 Kan. 300; *Turner v. Phoenix Ins. Co.*, 55 Mich. 236; *Equitable L. Ass. Soc. v. Brobst*, 13 Neb. 526; *Mass. Mut. L. Ins. Co. v. Eshelman*, 30 Ohio St. 647; *Goldwater v. Liverpool, etc., Ins. Co.*, 39 Hun, 176; *Campbell v. National L. Ins. Co.*, 24 Up. Can. C. P. 133; *Home L. Ins. Co. v. Pierce*, 65 Ill. 426; *O'Brien v. Union Mut. L. Ins.*, 22 Fed. Rep. 586.

<sup>6</sup> *Phoenix Mut. L. Ins. v. Hinesley*, 75 Ind. 1; *Liverpool, etc., Ins. Co. v. Ende*, 65 Tex. 118; *Sentell v. Oswego, etc., Ins. Co.*, 16 Hun, 516.

tual companies are chargeable with knowledge of their laws and consequently of all the limitations and restrictions upon the powers of the officers and agents contained in such laws. The requirements of the charter of a mutual organization cannot be waived.<sup>1</sup> The Supreme Court of Indiana has said: <sup>2</sup> "Whenever the charter of an insurance company requires that any act shall be done, and prescribes the mode in which such act shall be done, and declares that if the act be not done in the manner prescribed, the contract, or policy of insurance, shall be void, the company cannot waive the performance of such act in the prescribed mode; for performance of any condition of the contract fixed by law, cannot be waived. This has been repeatedly declared to be the law in cases involving the question of double insurance. Thus, in *Couch v. City Fire Ins. Co.*,<sup>3</sup> where the charter of the insurance company provided that 'if there shall be any other insurance upon the whole or any part of the property insured by any policy issued by said company during the whole or any part of the time specified in such policy, then every such policy shall be void, unless such double insurance shall exist by consent of said company, indorsed upon the policy under the hand of the secretary,' it was held by the Supreme Court of Connecticut that the insurance company could not waive the performance of the act required by such provision of its charter, in the mode prescribed, and that its consent to double insurance could only be proved by indorsement thereof upon the policy under the hand of the secretary." <sup>4</sup> A distinction

<sup>1</sup> *Brewer v. Chelsea M. F. Ins. Co.*, 14 Gray, 203; *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; *Baxter v. Chelsea M. Ins. Co.*, 1 Allen, 294; *Miller v. Hillsborough F. Assn.*, 42 N. J. Eq. 460; *Manufacturers', etc., Ins. Co. v. Gent*, 13 Bradw. 308; *Borgraefe v. Supreme Lodge, etc.*, 22 Mo. App. 127; *Harvey v. La Cie, etc.*, Ramsay's App. Cas. (Low. Can.) 378.

<sup>2</sup> *Leonard v. American Ins. Co.*, 97 Ind. 299.

<sup>3</sup> 38 Conn. 181.

<sup>4</sup> *Hackney v. Alleghany Mut. Ins. Co.*, 4 Pa. St. 185; *Evans v. Tri-mountains Ins. Co.*, 9 Allen, 329; *ante*, § 147.

is, however, made between matters touching the substance or essence of the contract and those which relate to certain formalities to be observed after a loss, such as the preliminary proofs to be furnished by the insured. As was said by the Supreme Court of Massachusetts: <sup>1</sup> "It is well settled that, although the by-laws of a mutual fire insurance company provide that in case of loss the assured shall furnish certain preliminary proofs to the officers to entitle him to recover for the loss, yet the officers may in any particular case waive this stipulation; that such waiver may be either express or by implication; and that it may be implied from the fact that in refusing to pay the loss they neglect to state their objections to the preliminary proofs, and place their refusal on other grounds."<sup>2</sup> A waiver of this sort is unlike a waiver of such provisions of the by-laws as relate to the substance of the contract. The officers have no power to dispense with these.<sup>3</sup> In the latter case <sup>4</sup> the distinction between these two classes of by-laws is pointed out. It is said that stipulations as to the preliminary proofs do not touch the substance or essence of the contract; but relate only to the form or mode in which the liability of the company shall be ascertained and proved. Besides, such preliminary proof must necessarily be submitted to the officers of the corporation who must pass on its sufficiency, and it therefore comes within the scope of their authority to say whether proof of the loss is sufficient."<sup>5</sup> A distinction has been made between the requirements contained in the charter and the same provisions in the by-laws, in regard to the authority of the officers of the

<sup>1</sup> *Priest v. Citizens' Mut. F. Ins. Co.*, 3 Allen, 602.

<sup>2</sup> *Underhill v. Agawam Ins. Co.*, 6 Cush. 440.

<sup>3</sup> *Hale v. Mechanics' Ins. Co.*, 6 Gray, 169; 66 Am. Dec. 410; *Brewer v. Chelsea Ins. Co.*, 14 Gray, 203.

<sup>4</sup> *Brewer v. Chelsea Ins. Co.*, *supra*.

<sup>5</sup> *Behler v. German, etc., Ins. Co.*, 68 Ind. 354; *Westchester, etc., Ins. Co. v. Earle*, 33 Mich. 150.

company to waive compliance therewith. For example, if membership of an association was by its charter limited to persons not over a certain age, such a provision could not be waived by the officers of the association; but, where the charter contained no restrictions as to the age of the members but the by-laws did, then the officers could waive the requirement.<sup>1</sup> The tendency of modern authority is to make no distinction between mutual and stock insurance companies in regard to their liability for the acts of their agents.<sup>2</sup> The general rule to be deduced from the preceding authorities is that, except when the company is mutual, it may, either by its own acts or those of its duly authorized agents, waive any of the provisions of the policy inserted therein for its benefit; or it may, by its own acts or those of its duly authorized agents, become estopped from claiming the benefit of such provisions. But agents can only waive compliance by the assured with the terms of the contract when they act within the apparent scope of their employment. If any limitations, or restrictions, upon the authority of agents are communicated to the persons dealing with them, acts of such agents not within such limitations will not bind their principals.<sup>3</sup>

§ 427. **Estoppel in Matters Relating to the Application.** — Although the answers of the insured in the application for insurance are untrue, or incomplete, and this fact might, under the terms of the contract, avoid it, the company may by its conduct, or the acts of its duly authorized agents, be held to have waived its right, or be estopped from setting up such right, to have the policy declared void for misrepresentation or breach of warranty. The insurance company, if the assured was not in fault, cannot take

<sup>1</sup> *Morrison v. Wisconsin Odd-fellows', etc., Co.*, 59 Wis. 169; *ante*, § 147. But see *Mulrey v. Shawmut, etc., Ins. Co.*, 4 Allen, 116.

<sup>2</sup> *Kausal v. Minnesota, etc., Assn.*, 31 Minn. 17; *ante*, § 156.

<sup>3</sup> See *ante*, § 152, *et seq.*

advantage of a mistake in the application when committed by its own agent, nor on the other hand can the beneficiaries, suing on the policy, claim that a false statement was made by the assured through his own mistake, inadvertence or ignorance, when such statement is declared by the policy to be a warranty,<sup>1</sup> nor if the application is made part of the contract can one who is able to read, and has warranted his answers to questions in such application to be true, be heard in the absence of fraud to say that he was ignorant of its contents.<sup>2</sup> If the answer to a question in the application assumes knowledge of the fact, the assured and those claiming under him will be precluded from alleging want of knowledge on the part of the assured as an excuse for not answering correctly.<sup>3</sup> If the company chooses to issue a policy without an application, or with an application defective but true as far as it goes, it will be held to have waived the want of the application or its defects.<sup>4</sup> After a loss has been adjusted the company is estopped to set up in defense to the claim, breaches of warranties or stipulations in the original policy.<sup>5</sup> The insurer is estopped from showing that its examining physician was incompetent, or that the recitals of his certificate are false, unless the physician was influenced by fraudulent representations or concealment of material facts.<sup>6</sup> And where the company is responsible for a misstatement in the application it is precluded from setting up such error to avoid the policy.<sup>7</sup> For example, an

<sup>1</sup> *Ala. Gold L. Ins. Co. v. Garner*, 77 Ala. 210.

<sup>2</sup> *Cuthbertson v. North Carolina Home Ins. Co. (N. C.)*, 2 S. E. Rep. 258.

<sup>3</sup> *Hartford L. & A. Ins. Co. v. Gray*, 91 Ill. 159.

<sup>4</sup> *Blake v. Exchange M. Ins. Co.*, 12 Gray, 265; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Liberty Hall Assn. v. Housatonic M. F. Ins. Co.*, 7 Gray, 261.

<sup>5</sup> *Godchaux v. Merchants' M. Ins. Co.*, 34 La. Ann. 235.

<sup>6</sup> *Holloman v. Insurance Co.*, 1 Woods, 674.

<sup>7</sup> *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun, 430; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Lueders v. Hartford L. & A. Ins. Co.*, 4 McC. 149; 12 Fed. Rep. 465.

applicant gave a true answer to a question by the medical examiner, but the latter wrote a different and untruthful answer in his report, but the applicant did not see the answer as written in the report and was ignorant of the fact that it differed from that given by him. Under these circumstances it was held that the company, not the insured, was responsible for the falsehood.<sup>1</sup> If, upon the face of the application, a question appears to be not answered at all, or to be imperfectly answered, and the insurers issue a policy without further inquiry, they waive the want or imperfection in the answer and render the omission to answer more fully immaterial.<sup>2</sup> And if, when the insurance company issues the policy, it knows that certain answers in the application are falsely answered, it waives the right to object by such issue.<sup>3</sup> But where the manager of an insurance company, having doubts as to the propriety of accepting a certain risk, caused the local agent of the company to make other inquiries concerning applicant's habits, and receiving satisfactory reports issued the policy, it was held<sup>4</sup> that the company was not estopped from relying upon the written application and showing that it contained willfully false statements, the effect of which, under the stipulations of the contract, avoided it. To what extent the company is bound to avail itself of means of knowledge of the falsity of answers in an application is a somewhat unsettled question. In a Wiscon-

<sup>1</sup> *Grattan v. Metropolitan L. Ins. Co.*, *supra*; *ante*, § 223.

<sup>2</sup> *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183; *Conn. Ins. Co. v. Luchs*, 108 U. S. 498; *Hall v. People's Ins. Co.*, 6 Gray, 185; *Liberty Hall Assn. v. Housatonic M. F. Ins. Co.*, 7 Gray, 261; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584; 44 N. J. L. 210; *Armenia Ins. Co. v. Paul*, 91 Pa. St. 520; 36 Am. Rep. 676; *Lebanon M. Ins. Co. v. Kepler*, 106 Pa. St. 28; *Lorillard F. Ins. Co. v. McCulloch*, 21 Ohio St. 173; *Am. Life Ins. Co. v. Mahone*, 56 Miss. 180; *ante*, § 204.

<sup>3</sup> *Schwarzbach v. Protective Union*, 25 W. Va. 622; *Gray v. National Ben. Assn.*, 111 Ind. 531; 11 N. East. Rep. 477; 9 West. Rep. 289.

<sup>4</sup> *Russell v. Canada L. Ass. Co.*, 32 Up. Can. C. P. 256; 8 Ont. App. 716.

sin case<sup>1</sup> the Supreme Court of that State held that where an insurance company has in its possession abundant evidence of a misrepresentation in an application for insurance, it is its duty to examine such evidence, and it is chargeable with notice of the misrepresentation. And, if after such notice, it fails to cancel the insurance and continues to make assessments upon the assured, it waives the right to cancel. But the Supreme Court of Michigan has held<sup>2</sup> that when a second application is presented to the company it is not obliged to take notice of the answers to the same questions in the first application, which would have shown that the answers in the second application were untrue. If the company, or society, with knowledge that certain answers in the application are false, receives premiums or assessments upon the policy, it will be estopped from setting up as a defense in an action on the policy, or certificate, the falsity of such answers. All of what we have said in this section has general application and applies to benefit societies as well as insurance companies, as far as the facts may be similar.<sup>3</sup> The reasons for the rule are so obvious as to not need recital; to hold any other way would be to connive at fraud and make bad faith immaterial.

**§ 428. The Same Subject: Knowledge, Mistakes or Fraud of Agents.** — It has frequently been a question to what extent the knowledge, misconduct or errors of agents of insurance companies in matters of applications are bind-

<sup>1</sup> *Morrison v. Wisconsin Odd-fellows' Mut. L. Ins. Co.*, 59 Wis. 162.

<sup>2</sup> *Brown v. Metropolitan L. Ins. Co.*, 8 West. Rep. 775; 32 N. W. Rep. 610.

<sup>3</sup> *Ball v. Granite State M. Aid Assn. (N. H.)*, 9 Atl. Rep. 103; 4 N. Eng. Rep. 289; *Appleton v. Insurance Co.*, 59 N. H. 541; *Insurance Co. v. Wolff*, 95 U. S. 326; *Morrison v. Wisconsin Odd-fellows' M. L. I. Co.*, 59 Wis. 162; *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622; *Watson v. Centennial M. L. Assn.*, 21 Fed. Rep. 698; *Excelsior M. Aid Assn. v. Riddle*, 91 Ind. 84; *Masonic M. Aid Assn. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295; *Hoffman v. Sup. Council Am. Leg. of Honor*, 35 Fed. 252;

ing upon their principals so as to amount to a waiver or estoppel in regard to certain requirements. The subject is complicated by the usual stipulations in the policies that the agents receiving the applications are to be regarded as representatives of the insured and not of the company. This matter has already been considered generally,<sup>1</sup> and it may now again be said that whenever knowledge of the agent's limited authority is brought home to the applicant he must act accordingly, or, if a copy of the application is annexed to the policy and contains untrue answers, written down so by the agent, although answered correctly by the applicant, then the company is not liable for such misconduct, and there can be no waiver nor estoppel.<sup>2</sup> Applicants for insurance policies are bound to good faith and must communicate fully and without reserve all information called for, or that is deemed material by the company. The company consummates the contract on the basis of the responses to the questions. If the agent has fuller information, not written in the answers, it would be his duty to communicate it to his principal. The applicant must be understood as making his overture to the company on the faith of the disclosures in his application. If the company, without fault on the part of the assured, is misled by the agent, who takes the preparation of the paper into his own hand and makes mistakes or omissions, the company is estopped, except as stated in the last paragraph, for the fault is not with the insured.<sup>3</sup> The New York Court of Appeals

<sup>1</sup> *Ante*, § 426.

<sup>2</sup> *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168.

<sup>3</sup> *American Ins. Co. v. Mahone*, 56 Miss. 180; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; *Mass. Mut. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Germania F. Ins. Co. v. McKee*, 94 Ill. 494; *McCall v. Phoenix M. L. Ins. Co.*, 9 W. Va. 237; *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Coolidge v. Charter Oak L. Ins. Co.*, 1 Mo. App. 109; *Taylor v. Mut. Ben. L. Ins. Co.*, 10 Hun, 52; *McArthur v. Globe Mut. L. Ins. Co.*, 14 Hun, 348;



broadly lays down the same principle that "if the statements in the application, relied upon as breaches of warranty, are inserted by the agent for the insurers without any collusion or fraud upon the part of the insured, the insurer is estopped from setting up their error or falsity as breach of warranty," and says the doctrine is well settled.<sup>1</sup>

§ 429. **Estoppel in Matters Relating to the Policy or Certificate.**—If the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent, with or without authority, represents that the policy will contain certain stipulations, which are not unlawful, then the policy must contain them or the insured is not bound to accept it. But in such case it is the duty of the insured, when he receives the policy, to promptly examine it, and if it does not contain the stipulations agreed upon to at once notify the company of such fact and of his refusal to accept the policy, or he will be deemed to have waived his right,<sup>2</sup> and so a party setting up an equitable estoppel is himself bound to the exercise of good faith. He must also act promptly, an estoppel must be mutual or reciprocal and unless the party relying on the estoppel shows that he acted on the same he will be held to have waived it.<sup>3</sup> If a person applying for a ten year paid-up

Western Ass. Co. v. Rector, 9 Ky. L. Rep. 3; Stone v. Hawkeye Ins. Co., 68 Ia. 737; Eggleston v. Council Bluffs Ins. Co. 65 Ia. 308; Donnelly v. Ins. Co., 70 Ia. 693, 28 N. W. Rep. 607, Continental Ins. Co. v. Pierce (Kan.), 18 Pac. Rep. 291.

<sup>1</sup> Mowry v. Rosendale, 74 N. Y. 363; Baker v. Home L. Ins. Co., 64 N. Y. 648; Maher v. Hibernia Ins. Co., 67 Id. 283; Rowley v. Empire Ins. Co., 36 N. Y. 550, 3 Keyes, 557; 4 Abb. Ct. App. D. 131; Eggleston v. Council Bluffs, etc., Ins. Co., 65 Ia. 308; Insurance Co. v. Wilkinson, 13 Wall. 222; Insurance Co. v. Mahone, 21 Id. 152; Miller v. Mut. Ben. L. Ins. Co., 31 Ia. 216; Sullivan v. Phoenix Ins. Co., 34 Kan. 170.

<sup>2</sup> American Ins. Co. v. Neiberger 74 Mo. 167; New York L. Ins. Co. v. Fletcher, 117 U. S. 519; Mound City L. Ins. Co. v. Twining, 19 Kan. 349. But see Palmer v. Hartford Ins. Co., 54 Conn. 488.

<sup>3</sup> Andrews v. Aetna L. Ins. Co., 85 N. Y. 334; 92 N. Y. 596.

policy receives one marked in plain terms "ordinary life policy" and pays premiums upon it for ten years, he will be held to have waived his rights to require one conforming to his application and equity will not relieve him from the consequences of his want of diligence.<sup>1</sup> Or if, for example, a policy is marked, participating, and after demand for a paid-up policy, the agent, instead of informing the assured that his policy, was non-participating and hence not, under the rules of the company, entitled to be exchanged for a paid-up policy, or that demand must be made in writing, told him that it was all right and he would attend to it, the company may be estopped from claiming that the demand was not rightly made, and it has been so held.<sup>2</sup> If the company, without consent of the wife, substitutes for a policy, payable to the wife of insured, one payable to the husband, which policy is afterwards with the consent of the company transferred to a third person, the company is estopped from denying the legal, independent existence of such policy, it having been responsible for its issue and instrumental in inducing innocent third parties to give value for it.<sup>3</sup> In the case first cited <sup>4</sup> the Court said: "This policy belonged originally, and notwithstanding the change, continued to belong to Mrs. Pilcher. As originally executed, her title thereto appeared affirmatively on the face of the instrument. The company, by unlawful collusion with Pilcher, suppressed this original instrument, and issued a new one in lieu thereof, in which it falsely declared that the policy was Pilcher's own, and, therefore, assignable by him. It did this, as the evidence shows, for the express purpose of ena-

<sup>1</sup> *Massey v. Cotton States L. Ins. Co.*, 70 Ga. 794; *Zallee v. Conn. Mut. L. Ins. Co.*, 12 Mo. App. 111.

<sup>2</sup> *Piedmont, etc., Ins. Co. v. Young*, 58 Ala. 476.

<sup>3</sup> *Pilcher v. New York L. Ins. Co.*, 33 La. Ann. 322, citing *Lemon v. Phoenix M. L. Ins. Co.*, 38 Conn. 294; *Chapin v. Fellowes*, 36 Conn. 132; *Dutton v. Willner*, 52 N. Y. 312.

<sup>4</sup> *Pilcher v. N. Y. Life Ins. Co.*, *supra*.

bling him, under cover of this apparent title, to raise money on the policy. It accepted his assignment thereof and the subsequent reassignment by his first assignees to a perfectly ignorant and innocent holder, who acted upon the faith of title as represented by the company itself in the body of the instrument and as recognized by the company in all its acts. It collected from this assignee the premiums down to the death of the insured. We accuse the company of no intentional wrong; but, for the purposes of this case, it occupies the same position as if it were a deliberate and intentional wrong-doer. It was a party to unlawful acts, and, as every one is presumed to know the law, it is presumed to know that they were unlawful. By its affirmative declaration in the body of the instrument that the policy was Pilcher's while, as is presumed, knowing and unlawfully concealing the fact that it was really his wife's; by its acceptance and recognition of Pilcher's assignment and of the re-assignment to the bank; and by the reception from the latter of the premiums, it distinctly authorized and induced the bank to accept and act upon, as true, the state of facts thus represented by itself; and it is now conclusively estopped from denying the truth thereof, and from escaping the performance of those obligations which result in law therefrom.<sup>1</sup> If the company has for a long period of time, as for example eight years, recognized a person as the beneficiary of a policy, it will be held to be estopped to deny his right to sue in his own name as such beneficiary.<sup>2</sup> And so, where a mutual benefit association voluntarily enters into a contract of insurance upon the life of a member for the benefit of one not expressly authorized or prohibited from becoming a beneficiary, which is not contrary to public policy, and receives all the premiums

<sup>1</sup> See *Barry v. Brune*, 71 N. Y. 261; *Landrum v. Knowles*, 22 N. J. Eq. 594; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156.

<sup>2</sup> *Continental L. Ins. Co. v. Hamilton*, 41 Ohio St. 274.

thereon, it will not be allowed to defeat a recovery on the policy, at the suit of the beneficiary, by claiming that the contract, on the part of the association, is *ultra vires*.<sup>1</sup>

§ 429a. **When Performance of Condition is Impossible.** — If, at the time of issuance of a policy, the company knew that the performance of a condition subsequent therein contained was impossible, or that such condition was inconsistent with the facts, the company will be deemed to have waived performance of such condition, and is estopped from claiming the benefit of it, if the assured has been guilty of no fault. As, for example, if payment of a premium be required to be made at a time when it cannot possibly be made. The following case is an illustration: The assured on June 5th, 1867, applied to the agent in San Francisco of the defendant, a New York life insurance company, for a policy, on his life and paid the first quarterly premium, for which payment he received a receipt of that date specifying that if the application should be accepted the policy should be in effect from that day, if the application was not accepted the money should be returned. The company issued the policy, but dated it April 5th, instead of June 6th, and made the quarterly premiums payable at its office in New York on the sixth days of April, July, October and January in each year. If the premiums were not paid at these times the policy was to be void. At that time from twenty-three to thirty days were required for the passage from New York to San Francisco. The policy was received by the agent in San Francisco, August 2, 1867, who notified the assured to call and get the policy. The assured was mortally wounded August 21, 1867, and died a few days later, never having paid the quarterly premium due July 6, 1867. In an action on the policy this non-payment was set up by the company as a defense.

<sup>1</sup> *Bloomington Mut. Ben. Assn. v. Blue*, 120 Ill. 121.

It was held by the court that, as the company must have known when the policy was issued that the quarterly premium of July 6th could not, by the very nature of things, be paid at its office, or elsewhere, according to the condition of the contract, the performance of the condition was waived. The further reason for holding a waiver was the supposed intention of the company.<sup>1</sup>

**§ 430. Waiver or Estoppel in Matters Relating to Assignment or Change of Beneficiary.** — Although the assignor of a policy allege in a statement to the company that certain assignments of such policy were obtained from him by fraud, he is not thereby estopped from showing that the assignments were void because of his incapacity, by reason of drunkenness, to make the same.<sup>2</sup> An assignee under an assignment of life policies, such assignment being absolute in its terms, is not so far bound to disclose the nature of his claims to a subsequent assignee of the assured, the latter assignment being made subject to the lien of the first assignee for moneys advanced by him on said policies, or otherwise on the account of the assignor, that he will be estopped, in a suit for the distribution of the proceeds of such policies, from showing consideration in support of the first assignment to the full amount of the policies.<sup>3</sup> It has been held<sup>4</sup> that a benefit society can waive the formalities

<sup>1</sup> *Young v. Mut. L. Ins. Co.* (U. S. Cir. Ct. Cal.), 2 Ins. L. J. 289. On appeal to the Supreme Court of the United States this judgment was reversed on the ground that the company by not issuing the policy according to the terms of the application, the times of payment of premium being changed, there was no contract, the minds of the contracting parties never having met: *Ins. Co. v. Young*, 23 Wall. 85. See to the point stated in the text, *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Andes Ins. Co. v. Shipman*, 77 Ill. 189.

<sup>2</sup> *Bursinger v. Bank of Watertown*, 67 Wis. 75.

<sup>3</sup> *Diffenbach v. Vogeler*, 61 Md. 370.

<sup>4</sup> *Manning v. Ancient Order of United Workmen* (Ky.), 5 S. W. Rep. 385; *Splawn v. Chew*, 60 Tex. 532; *ante*, § 308.

prescribed by its laws for the change of beneficiary, so as to make such change valid. For example, in a case in Kentucky<sup>1</sup> the laws of the society required the member, if he desired to change the beneficiary in his certificate, to surrender such certificate, with a form on the back of it filled up and signed by him and attested by the recorder of the lodge under its seal, and pay a certain fee. The member in question wrote a letter to the recorder of the lodge, in whose possession the certificate was, expressing his wish for a change of beneficiary, but paid no fee. The supreme lodge, which issued the old certificate, recognized this letter and cancelled the old and issued a new certificate as requested, and it was held that the old beneficiary in the first certificate could not set up this informal change as against the society, but that the waiver of the informalities was effectual. This view is not in accordance with the great weight of authority, which is to the effect that a benefit society cannot waive the formalities prescribed by its laws for change of beneficiary, because they are a part of the contract and further, because they are not waiving their own rights but those which are secured by the contract to the first beneficiary.<sup>2</sup> Where, by the laws of a benefit society, the certificate was only assignable by and with the consent of the association thereon indorsed, and the member had assigned the certificate without such consent of the association, it was held that the association could insist upon this provision of the contract. Further, that the receipt by the association from the assignee, after the death of the assignor, of assessments due on the certificate was not such a waiver on its part, or such a recognition of the rights of the assignee as would entitle him to recover on the certificate, because "the assessments due the association might be paid by any one, and the fact that they

<sup>1</sup> *Manning v. A. O. U. W.*, *supra*.

<sup>2</sup> See authorities cited, *ante*, § 307.

were received from a volunteer, or any one else, did not affect the contract.”<sup>1</sup>

§ 431. **Waiver or Estoppel by Receipt of Premium or Assessments.**—If the company receives payment of the premium with knowledge of the breach of the conditions of the policy, it will ordinarily be held to have waived the breach and be estopped from alleging such breach as a ground of forfeiture.<sup>2</sup> The Supreme Court of Illinois, however, has said: “The mere act, however, of receiving, or collecting the premium by the insurance company, with knowledge of an existing right of forfeiture, has, so far as we know, never been held to estop the company from setting up such forfeiture, if the assured had no reason fairly to conclude, from the acts and declarations of the company, or its agents, that the forfeiture had been or would be waived, when he made the payment of the premium, or unless the payment was made in reliance upon the validity of his policy, induced by the acts, declarations or silence of the company.” But it seems that good faith would require the company, when it becomes aware of a right of forfeiture to avail itself of it within a reasonable time, and if, after obtaining such knowledge, it collects a premium, it should be held to have waived the forfeiture. Whether, after receiving assessments upon a benefit certificate, a benefit society in an action thereon after a loss has occurred, can set up the defense of *ultra vires*, or whether it is estopped, is a question of some doubt. It has been held that under such circumstances the society is precluded from

<sup>1</sup> National Mut. Aid Soc. v. Lupold, 101 Pa. St. 111.

<sup>2</sup> Mershon v. National Ins. Co., 34 Ia. 87; Viele v. Germania Ins. Co., 26 Ia. 55; Phoenix Ins. Co. v. Lansing, 15 Neb. 494; Lasher v. Northwestern, etc., Ins. Co., 55 How. Pr. 318; Martin v. New Jersey Ins. Co., 44 N. J. L. 273; Pomeroy v. Rocky Mountain, etc., Ins. Co., 9 Colo. 295.

<sup>3</sup> Northwestern Mut. L. Ins. Co. v. Amerman, 119 Ill. 329; 10 N. East. Rep. 225; 7 West. Rep. 712.

its defense.<sup>1</sup> Upon grounds of public policy other authorities hold differently.<sup>2</sup> The receipt of an assessment with one overdue waives the forfeiture for non-payment;<sup>3</sup> and if it has been in the habit previously of receiving assessments after they were due, without question, it may be estopped from setting up the defense of forfeiture for non-payment at the specified time.<sup>4</sup> The Supreme Court of Wisconsin has held<sup>5</sup> that the doctrine of waiver applies to mutual benefit societies, and that if assessments are received after the death of a member, by the local lodge, the retention of them by the Supreme Lodge, with knowledge, waived the forfeiture.<sup>6</sup> It is doubtful, however, whether a subordinate lodge, or its ministerial officer, can waive the positive requirements of the laws of the order.<sup>7</sup> There will be no waiver of forfeiture for non-payment of an assessment by receipt of a subsequent one if such receipt is by mistake,<sup>8</sup> nor if the company had no knowledge of the breach of condition,<sup>9</sup> nor, if the custom of the company was to receive overdue premiums only if the in-

<sup>1</sup> *Matt v. Roman Catholic, etc., Soc.*, 70 Ia. 455; 30 N. W. Rep. 799; *Bloomington M. Ben. Assn. v. Blue*, 120 Ill. 121.

<sup>2</sup> *American Legion of Honor v. Perry*, 140 Mass. 580; *National M. Aid Soc. v. Lupold*, 101 Pa. St. 111; *Webster v. Buffalo Ins. Co.*, 7 Fed. Rep. 399; 2 McC. 348; *ante*, § 244.

<sup>3</sup> *Tobin v. Western Mut. Aid Soc.*, 71 Ia. 261; 33 N. W. Rep. 663; *Rice v. New England M. Aid Soc. (Mass.)*, 5 N. Eng. Rep. 818; 15 N. East Rep. 624; *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

<sup>4</sup> *Stylow v. Wisconsin Odd-fellows' M. L. Ins. Co.*, 69 Wis. 224; 34 N. W. Rep. 151.

<sup>5</sup> *Erdmann v. Mut. Ins. Co., Hermann's Sons*, 44 Wis. 376.

<sup>6</sup> *Illinois Masons' Benev. Soc. v. Baldwin*, 86 Ill. 479.

<sup>7</sup> *Borgraeffe v. Supreme Lodge K. and L. of H.*, 22 Mo. App. 127; 26 Mo. App. 218; *Miller v. Hillsborough F. Assn.*, 42 N. J. Eq. 458; *Swett v. Citizens Mut. R. Soc.*, 78 Me. 541. But see *Manning v. A. O. U. W. (Ky.)*, 5 S. W. Rep. 385; *Splawn v. Chew*, 60 Tex. 532; *Erdmann v. Wisconsin, etc., Ins. Co.*, 44 Wis. 376.

<sup>8</sup> *Elliott v. Lycoming, etc., Ins. Co.*, 66 Pa. St. 22.

<sup>9</sup> *Gilbert v. North Am. F. Ins. Co.*, 23 Wend. 43; *Robertson v. Metropolitan L. Ins. Co.*, 88 N. Y. 541.



sured was in good health and, in fact, the insured at the time of such receipt was not in good health.<sup>1</sup> There may be a conditional waiver in receiving premium or assessments, as if when an overdue premium is paid, it be stated that it is received on condition that the insured is in health, or if such had been the custom of the company.<sup>2</sup> While the occasional reception of premiums after they were due is evidence from which a waiver of the condition of forfeiture may be found, the favor granted by renewing the policy after one failure to pay at the day stipulated, cannot of itself bind the company to waive a subsequent forfeiture that attached by reason of another failure.<sup>3</sup> Especially if the health of the insured has become impaired.<sup>4</sup> To make out a case where receipt of overdue premiums can be relied upon to create a usage that will estop the company from claiming a forfeiture for non-payment of assessments, it must be shown not only that premiums were habitually received after they were due, which would be a waiver of those several forfeitures, but also that the insurer intended to waive the future prompt payment of the premiums as one of the conditions of the contract, or that the assured, as a reasonable man, was led to believe by its actions that it had waived this condition.<sup>5</sup> If an agent, without authority to waive a forfeiture for non-payment of a premium at maturity, has received the unpaid part of a premium on a forfeited policy, for which he gave an antedated receipt, which premium the company has received, in ignorance of the

<sup>1</sup> *Lewis v. Phoenix M. L. Ins. Co.*, 44 Conn. 73.

<sup>2</sup> *Rockwell v. Mut. L. Ins. Co.*, 27 Wis. 372; 20 Wis. 335; 21 Wis. 548, *Crossman v. Mass. Benev. Assn.*, 143 Mass. 435; *Unsell v. Hartford L. & A. Ins. Co.*, 32 Fed. Rep. 443.

<sup>3</sup> *Marston v. Mass. M. Life Ins. Co.*, 59 N. H. 92; *Mutual L. Ins. Co. v. Girard L. Ins. Co.*, 100 Pa. St. 172; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Thompson v. Knickerbocker L. Ins. Co.*, 2 Woods, 547; 104 U. S. 252.

<sup>4</sup> *National Mut. Ben. Assn. v. Miller (Ky.)*, 2 S. W. Rep. 900.

<sup>5</sup> *Crossman v. Mass. Ben. Assn.*, 143 Mass. 435.

true circumstances under which it was paid, it will not be estopped from claiming the forfeiture if the money so paid be tendered back on discovery of the facts.<sup>1</sup> The company will be estopped from contesting the validity of a policy if, with knowledge of the facts, it has assured the holder that there will not be any question over it and thereby led him to pay the premium,<sup>2</sup> or if it recognizes, after a default, the continued existence of the policy by notifying the assured that he is liable to suspension unless he at once pays.<sup>3</sup> And a forfeiture may be waived by failure to offer to return the unpaid premium note, as required by the contract, although the company did give the notice of forfeiture under the contract.<sup>4</sup>

§ 432. **The Same Subject: Notices of Premium or Assessments.** — The mere sending of assessment notices to members who have been suspended for non-payment of assessments, the same being sent for the purpose of inviting reinstatement, will not of itself amount to a waiver of the forfeiture,<sup>5</sup> nor will the receipt of many assessments over due, if the member was required at the time of payment of such assessments to furnish certificates of health which were not furnished when the last over due assessment was received, and the insured was not at the time in health.<sup>6</sup> And, if the payment be extended as an act of kindness to a certain time, and it is not made within that time, there will be no waiver.<sup>7</sup> An estoppel cannot be claimed unless the insured was induced by the company to do, or omit to do, an act,

<sup>1</sup> Union Mut. L. Ins. Co. v. McMullen, 24 Ohio St. 67; Diboll v. Aetna L. Ins. Co., 32 La. Ann. 179.

<sup>2</sup> Ferguson v. Mass. Mut. L. Ins. Co., 32 Hun, 306; 102 N. Y. 647.

<sup>3</sup> Olmstead v. Farmers' M. F. Ins. Co., 50 Mich. 200.

<sup>4</sup> Johnson v. Southern M. L. Ins. Co., 79 Ky. 403.

<sup>5</sup> Mutual Protection L. Ins. Co. v. Laury, 84 Pa. St. 43.

<sup>6</sup> Crossman v. Mass. Ben. Assn., 143 Mass. 435.

<sup>7</sup> Illinois Masons' Ben. Soc. v. Baldwin, 86 Ill. 479; Servoss v. Western M. Aid Soc., 67 Ia. 86.

which he would not otherwise have done or omitted.<sup>1</sup> So, where the secretary of a company, in which the husband of the plaintiff held a life policy, wrote him Dec. 7th that certain assessments, which were then over due and by non-payment of which the policy was forfeited, would be received and the forfeiture waived if remitted immediately. Remittance was not then made but on the 25th of the month the insured was taken sick and on the 31st he died. On the 30th of that month at the request of the insured the remittance was made and printed receipts were returned by the company, each containing the provision that it should be valid only on condition that the assured was alive and in good health on the day of its date; but on the margin of each receipt the secretary had written the words "no default." After the company was informed of the death of insured it returned the money. The court held that because remittance was not made immediately upon receipt of the letter of Dec. 7th, the offer therein contained to waive the default was at an end.<sup>2</sup> But the insurer will be estopped from setting up non-payment of premiums as a cause of forfeiture if it has been in the habit of giving notice of the amount of the premium and time of payment and without notice ceases to do so; <sup>3</sup> or if its general agent has waived the prompt payment of the premium; <sup>4</sup> or if its agent, acting within the apparent scope of his authority, has received a part of the premium and given time for the balance,<sup>5</sup> or if he, with knowledge of the company, has received the entire premium after the day.<sup>6</sup> The company cannot change its

<sup>1</sup> Illinois Masons', etc., Soc. v. Baldwin, *supra*.

<sup>2</sup> Servoss v. Western Mut. Aid Soc., *supra*.

<sup>3</sup> Insurance Co. v. Eggleston, 96 U. S. 572; *ante*, §§ 350, 362.

<sup>4</sup> Marcus v. St. Louis M. L. Ins. Co., 68 N. Y. 625; Whitehead v. New York L. Ins. Co., 102 N. Y. 143, reversing 38 Hun, 425; Dean v. Aetna L. Ins. Co., 62 N. Y. 642, reversing 2 Hun, 358; Palmer v. Phoenix M. L. Ins. Co., 84 N. Y. 63.

<sup>5</sup> Murphy v. Southern L. Ins. Co., 3 Baxt. (Tenn.) 440.

<sup>6</sup> Froelich v. Atlas L. Ins. Co., 47 Mo. 406.

course of dealing or custom of giving notice or receiving premiums after the day, without notice to the insured of such change.<sup>1</sup> There are fine distinctions in the cases in regard to duty of the company to give notice of the falling due of a premium. Where the amount of the premium and the place of its payment are fixed and certain then the company is not only not bound to give notice, but in fact also will not be bound to continue to give notice even, if it has been in the habit of giving it, unless the custom has continued so long as to justify the insured in relying on it, and he must actually have relied upon such custom and have been misled thereby. But if the amount of the premium is uncertain, because liable to be reduced by dividends, and the company is in the habit of notifying the assured of the amount of these dividends and of the cash payment to be made, then, if it does not give the customary notice, it will be estopped from claiming forfeiture for non-payment of the premium.<sup>2</sup>

§ 433. **The Same Subject: General Rule.** — If the company has by its course of conduct, acts or declarations, or by any language in the policy, misled the insured in any way in regard to the payment of premiums, or created a belief on the part of the insured that strict compliance with the letter of the contract as to payment of the premium on the day stipulated would not be exacted, and the insured in consequence fails to pay on the day appointed, the company will be held to have waived the requirement, and will be estopped from setting up the condition as cause for for-

<sup>1</sup> *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 86 Pa. St. 236; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516; 29 Am. Rep. 200; *Atty.-General v. Continental L. Ins. Co.*, 33 Hun, 138; *Dilleber v. Knickerbocker Ins. Co.*, 76 N. Y. 567; 7 Daly, 540; *Mayer v. Mut. L. Ins. Co.*, 38 Ia. 304; 18 Am. Rep. 34.

<sup>2</sup> *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S. 30; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *ante*, § 360.

feiture.<sup>1</sup> In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the non-payment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the assured, or by the acts and declarations of his authorized agents, has induced in the mind of the assured an honest belief that the terms and conditions of the policy, declaring a forfeiture in event of non-payment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been induced, and the insured has acted on it, the insurer will be estopped from insisting on the forfeiture.<sup>2</sup> The issue of a certificate after an assessment is in default is a waiver of forfeiture for its non-payment.<sup>3</sup>

**§ 434. General Rules of the Law of Waiver or Estoppel apply to Insurance Contracts.**—Questions of waiver or estoppel in cases relating to insurance contracts are to be determined by the application of the same rules as in cases upon other contracts. While we have referred to some acts and circumstances under which either a waiver or an estoppel has been held to exist, it is not possible to specify what words or conduct will in every case amount to waiver of the

<sup>1</sup> *Protection L. Ins. Co. v. Foote*, 79 Ill. 361; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541; *Fowler v. Metropolitan L. Ins. Co.*, 41 Hun, 357; *Washoe Tool Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613; 7 Hun, 74; *Equitable Ins. Co. v. McCrea*, 8 Lea, 541; *Steele v. St. Louis M. L. Ins. Co.*, 3 Mo. App. 207; *Piedmont & Arlington, etc., Ins. Co. v. Fitzgerald, W. & W. (Tex.)* 784; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Insurance Co. v. Tullidge*, 39 Ohio St. 240; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84.

<sup>2</sup> *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Insurance Co. v. Eggleston*, 96 U. S. 572; *Tripp v. Insurance Co.*, 55 Vt. 100; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Hanley v. Life Association*, 69 Mo. 380; *Southern L. Ins. Co. v. Kempton*, 56 Ga. 339; *Am. L. Ins. Co. v. Green*, 57 Ga. 469; *Cotton States L. Ins. Co. v. Lester*, 62 Ga. 247.

<sup>3</sup> *Roswell v. Equitable Aid Union*, 13 Fed. Rep. 840.

requirements or conditions of the policy, or estop the company from insisting upon them. Each case rests upon its own facts and must be determined by the general rule, applicable to all kinds of contracts, for what might under some circumstances estop the company would not in another case where the facts were only very slightly different. Whether a party has waived a condition in a contract is a mixed question of law and fact, but when the facts are found, it is for the court to say whether or not the company has been estopped from claiming its rights under the policy by reason of what it has done or failed to do.

**§ 435. Calling for Proofs of Loss Waives Breach of Conditions.**—If the company, after being notified of a loss, has knowledge of false answers in the application or of a breach of the conditions of the policy and, notwithstanding that fact, calls for proofs of loss; or if, after receiving proofs, with knowledge of such false answers, it asks for additional proofs, it thereby waives the right to rely upon the breach of warranty or of the condition.<sup>1</sup> The reason of the rule is obviously that the company should not be permitted by its conduct to cause the insured to go to the expense of proofs of loss, when it knows that it will be a useless act. The question has arisen more frequently in cases of fire than in those of life insurance, but there is no reason why the principle should not apply to both. The rule is to be applied with caution, for to constitute a waiver

<sup>1</sup> *Cobbs v. Fire Assoc., etc.* (Mich.), 36 N. W. Rep. 222; 13 W. Rep. 149; *Marthinson v. North British, etc., Ins. Co.* (Mich.), 31 N. W. Rep. 291; 7 West. Rep. 637; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Northwestern, etc., Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446; *Gans v. St. Paul, etc., Ins. Co.*, 43 Wis. 108; *Cannon v. Home Ins. Co.*, 53 Wis. 585, where the seemingly opposite cases of *Fitchpatrick v. Hawkeye Ins. Co.*, 53 Ia. 335 and *Phoenix Ins. Co. v. Stevenson*, 78 Ky. 150; 8 Ins. L. J. 922, are distinguished; *German F. Ins. Co. v. Grunert*, 112 Ill. 68; *Titus v. Glen's Falls Ins. Co.*, 81 N. Y. 410; *Canada Landed Credit Co. v. Canada, etc., Ins. Co.*, 17 Grant's Ch. (Up. Can.) 418.

or estoppel all the elements essential to the act must have been present; the company must with knowledge of the breach have encouraged the assured to make proofs, and this encouragement must have materially influenced the performance of the indicated act. The Supreme Court of Iowa has well stated the doctrine in passing upon certain instructions. It said: <sup>1</sup> "The general doctrine of the instructions is that if defendant, with full knowledge of the facts out of which the forfeiture of the policy arose, neglected to declare its intention of insisting on the forfeiture, but, by its acts, recognized and treated the policy as a valid and subsisting contract between it and plaintiff, and induced him to act in that belief, it is precluded now from insisting on the forfeiture. This doctrine is excepted to by defendant. Its position is that to constitute a waiver of the provisions of the policy providing for the forfeiture, the acts relied on must be attended with such equitable circumstances as would create an estoppel; and, as plaintiff was not induced by the acts in question to in any manner change his position with reference to the subject of the negotiation, and as the acts were done after the forfeiture occurred, they do not create an estoppel. We think, however, that this position is not tenable. The principle on which the waiver of a forfeiture has been maintained in such cases is undoubtedly similar to that of estoppel. It was so held by this court in *Viele v. Germania Ins. Co.*<sup>2</sup> But we think it is not true that such waiver can be created only by such acts or conduct as would create a technical estoppel. Neither forfeitures nor estoppels are favored by the law, and it follows necessarily from this consideration that the waiver of a forfeiture may be sustained by circumstances which do not present the strong equities which would be required to create an estoppel. When plaintiff asserted a claim under

<sup>1</sup> *Hollis v. State Ins. Co.*, 65 Ia. 454.

<sup>2</sup> 26 Ia. 55.

the policy for the loss, and defendant was informed of the facts out of which the forfeiture grew, it had the right at once to treat the contract as at an end. If it had elected simply to remain silent, perhaps a waiver could not have been inferred from its silence. But if, with knowledge of the circumstances, it continued to treat the contract as of binding force, and induced plaintiff to act in that belief, the rule holding that it thereby waived the forfeiture is a very just one. We think, therefore, that the general doctrine of the instructions is correct, and it is well sustained by the authorities.”<sup>1</sup> There can be, however, no waiver of a stipulation in an agreement unless with knowledge of the circumstances,<sup>2</sup> consequently false representations in procuring the policy are not waived by demanding additional proofs of loss, the fact that the representations were false not being known to the company when it made such a demand.<sup>3</sup>

**§ 436. Other Acts of Insurer in Regard to Proofs of Loss Amounting to Waiver of Particular Requirements.** — In treating of the subject of proofs of loss,<sup>4</sup> we referred to a few of the most elementary rules of waiver and estoppel which are now so well established as to be axiomatic. Some have indeed never been questioned. The first of these is that when proofs are made in time, the company must point out specifically its objections thereto, or it will be estopped to say that the proofs are insufficient; if it makes specific objections it waives all others; and if the proofs are corrected so as to obviate the objections made and they are

<sup>1</sup> *Titus v. Glen's Falls Ins. Co.*, 81 N. Y. 410; *Insurance Co. v. Norton*, 96 U. S. 234; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Northwestern Mut. L. Ins. Co. v. Germania Ins. Co.*, 40 Wis. 453; *Cannon v. Home Ins. Co.*, 53 Wis. 585.

<sup>2</sup> *Bennecke v. Conn. Mut. L. Ins. Co.*, 105 U. S. 355.

<sup>3</sup> *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis. 671; *Phillips v. Grand River, etc., Ins. Co.*, 46 Up. Can. Q. B. 334.

<sup>4</sup> *Ante*, § 411, *et seq.*



still not satisfactory, its objections must again be stated within the time limited for making proofs or it will be estopped. The company must point out the defects in the proofs of loss within a reasonable time.<sup>1</sup> Mere silence cannot often be construed to be a waiver, but generally the reverse.<sup>2</sup> Silence is not a waiver if the proofs are received after the stipulated time.<sup>3</sup> Nor are defects in the proofs waived by a mere rejection of the claim of the insured, it not appearing on what ground it was rejected;<sup>4</sup> but otherwise if the cause of rejection did appear and such cause was not for defects in the notice or statement of loss.<sup>5</sup> The disclaimer of all liability, or the placing of the refusal to pay on other grounds than the failure to furnish proofs, is a waiver of such proofs, and they need not, under such circumstances, be furnished.<sup>6</sup> An adjustment of the loss

<sup>1</sup> *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Fire Ins. Co. v. Fehrath*, 77 Ala. 194; *Planters' M. Ins. Co. v. Engle*, 52 Md. 468; *Butterworth v. Western Ass. Co.*, 132 Mass. 489; *Eliot, etc., Bank v. Commercial Union Ins. Co.*, 142 Mass. 142; *Mercantile Ins. Co. v. Holthaus*, 43 Mich. 423; *Swan v. Liverpool, etc., Ins. Co.*, 52 Miss. 704; *Am. L. Ins. Co. v. Mahone*, 56 Miss. 180; *Breckenridge v. Am. Central Ins. Co.*, 87 Mo. 62; *Hibernia M. F. Ins. Co. v. Meyer*, 39 N. J. L. 482; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 474; 10 N. East. Rep. 242; 8 West. Rep. 88; *Myers v. Council Bluffs Ins. Co. (Ia.)*, 33 N. W. Rep. 453; *Ben Franklin F. Ins. Co. v. Flynn*, 98 Pa. St. 627, and other cases too numerous to mention. See *ante*, § 411.

<sup>2</sup> *Ayres v. Hartford F. Ins. Co.*, 17 Ia. 176; *Keenan v. Miss., etc., Ins. Co.*, 12 Ia. 126; *Susquehanna M. F. Ins. Co. v. Hallock (Pa.)*, 14 Atl. Rep. 167.

<sup>3</sup> *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Bell v. Lycoming F. Ins. Co.*, 19 Hun, 238; *St. Amand v. La Cie D' Assurance*, 9 Quebec L. R. 162; *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551; *Mueller v. Southside F. Ins. Co.*, 87 Pa. St. 399; *Mason v. Andes Ins. Co.*, 25 Up. Can. C. P. 37; *O'Connor v. Commercial, etc., Ins. Co.*, 3 Russ & C., etc. (Nova Scotia) 119.

<sup>4</sup> *Spooner v. Vermont M. F. Ins. Co.*, 53 Vt. 156.

<sup>5</sup> *McMasters v. Westchester Co. M. Ins.*, 25 Wend. 379; *Graves v. Washington M. Ins. Co.*, 12 Allen, 391. But this case of *Spooner v. Vermont, etc., Ins. Co.*, *supra*, does not seem to be logically right.

<sup>6</sup> *Covenant Mut. Ben. Assn. v. Spies*, 114 Ill. 403; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; *Ætna Ins. Co. v. Shryer*, 85 Ind. 362;

and a promise to pay estop the company from denying its liability.<sup>1</sup>

§ 437. **When Insurer is Precluded from Certain Defenses.** — It has been also held that when sued upon a policy the company cannot make any objections to paying a loss that are different from or additional to those which it stated when it refused to pay.<sup>2</sup> An insurance company, however, is not deprived of the defense of breach of warranty because, when a claim is first presented, while denying its liability, it omits to disclose the ground of defense or states another ground than that on which it finally relies; there must be in addition evidence justifying a finding that, with full knowledge of the facts, there was an intention to abandon or not to insist upon such defense, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury.<sup>3</sup>

*Carson v. German Ins. Co.*, 62 Ia. 433; *Phoenix Ins. Co. v. Adams (Ky.)*, 8 Ky. Law Rep. 532; *Daul v. Firemen's Ins. Co.*, 35 La. Ann. 98; *Home Ins. Co. v. Gaddis*, 3 Ky. L. Rep. 159 (Ky. Ct. Appeals); *Aurora, etc., Ins. Co. v. Kranich*, 36 Mich. 289; *Rokes v. Amazon Ins. Co.*, 51 Md. 512; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662; *German Am. Ins. Co. v. Davidson*, 67 Ga. 11; *Merchants', etc., Ins. Co. v. Vining*, 68 *Id.* 197; *Goodwin v. Mass. Mut. L. Ins. Co.*, 73 N. Y. 480; *Kantrener v. Penn. M. L. Ins. Co.*, 5 Mo. App. 581; *Marston v. Mass. M. L. Ins. Co.*, 59 N. H. 92; *King v. Hekla F. Ins. Co.*, 58 Wis. 508; *Zielke v. London Ass. Corp.*, 64 *Id.* 442; *Knickerbocker L. Ins. Co. v. Pendleton*, 112 U. S. 696; *Home Ins. Co. v. Baltimore W. Co.*, 93 U. S. 546; *Payn v. Mut. Relief Soc.*, 6 N. Y. St. R. 365; 17 Abb. N. C. 53; *Penn. F. Ins. Co. v. Dougherty*, 102 Pa. St. 568; *Girard L. Ins. Co. v. Mut. L. Ins. Co.*, 97 Pa. St. 15; *Kansas Protective Union v. Whitt (Kan.)*, 14 Pac. Rep. 275; *Lazensky v. Sup. Lodge K. of H.*, 31 Fed. Rep. 592, and many others. See *ante*, § 413.

<sup>1</sup> *Fishback v. Phoenix Ins. Co.*, 54 Cal. 422; *Simpson v. Windham, etc., Ins. Co.*, 57 N. H. 160; *Greenfield v. Mass. Mut. L. Ins. Co.*, 47 N. Y. 430; *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *Reed v. McLaughlin*, 2 Han. (N. B.) 128; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560.

<sup>2</sup> *Castner v. Farmers' M. Ins. Co.*, 50 Mich. 273; *Brink v. Hanover F. Ins. Co.*, 80 N. Y. 108.

<sup>3</sup> *Devens v. Mechanics', etc., Ins. Co.*, 83 N. Y. 168; *Graham v. Firemen's Ins. Co.*, 9 Daly, 341.

And a party to a litigation cannot be confined to the position first taken by him and out of which the litigation arose if he took such position under a mistake of facts that was due to the want of information which the other party ought to have given him.<sup>1</sup> An offer to compromise can never estop the party making it from setting up any defense, or asserting any right to which the offer relates,<sup>2</sup> but by paying the amount due on a policy the company waives all questions as to the validity of the contract which it had the means of raising when it paid, except fraud.<sup>3</sup>

<sup>1</sup> *Lyon v. Travelers' Ins. Co.*, 55 Mich. 141.

<sup>2</sup> *Cook v. Continental Ins. Co.*, 70 Mo. 610.

<sup>3</sup> *Metropolitan L. Ins. Co. v. Harper*, 3 Hughes, 260. Citing *National L. Ins. Co. v. Minch*, 53 N. Y. 144; *Mutual L. Ins. Co. v. Wager*, 27 Barb. 354. A number of questions arise as to the effect of proofs of loss after action brought to recover on the policy, and to what extent the assured is precluded from contradicting the statements therein made, but this matter relates more properly to evidence and will be considered in the following chapter. *Post*, § 471.

## CHAPTER XIV.

### REMEDIES, PRACTICE, PLEADING AND EVIDENCE, INSOLVENCY AND WINDING UP.

- § 440. Concerning the Subject of this Chapter.
- 441. Parties and Forms of Action in Suits by or against Voluntary Associations.
- 442. Remedies of Members of Benefit Societies, Unlawfully Expelled: Jurisdiction of Equity: *Mandamus*: Action for Damages.
- 443. Limitations in Policies on Time Within which Action must be Brought Thereon, or as to place of Bringing Suit, or as to Issue of Execution.
- 444. When the Statute of Limitations Applies.
- 445. When the Limitations do not Attach: Waiver: Excuses for not Bringing Suit.
- 446. When Time of Limitation begins to Run.
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- 448. Condition of Limitation as to time of Bringing Suit not Usual in Life Insurance Policies: Construction.
- 449. Conditions Concerning Arbitration Seldom found in Life Insurance Policies.
- 450. Agreements to Refer to Future Arbitration when and to what Extent Valid.
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- 456. Evidence in Actions on Insurance Contracts.
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- 458. Admissibility of Parol Evidence to Explain or Modify Answers of Assured in Application.
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- 460. Declarations of Assured.
- 461. Evidence of Physician as to Knowledge Acquired in course of His Employment.
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- § 465. When Parol Evidence Admissible.
- 466. Canvassing Documents, Prospectuses, Rules, etc.
- 467. Evidence of Usage.
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- 472. Foreign Insurance Companies can Remove Causes to Federal Courts.
- 473. Retaliatory Legislation.
- 474. Insurance Companies Subject to Insolvency and Bankruptcy Laws Like Other Corporations.
- 475. Winding up by Insurance Commissioner: Special Deposit with State; Insolvency of Mutual Company: Effect of Charter Provisions.
- 476. Attachments of Company's Property by Policy Holders.
- 477. Receivers of Insurance Companies.
- 478. Insolvent Life Insurance Companies: *Status* of Policy Holders.
- 479. Insolvent Benefit Societies.
- 480. On Dissolution of Mutual Insurance Company Surplus Assets, After Creditors are paid, Vest in State.

§ 440. Concerning the Subjects of this Chapter. — We shall not attempt, within the limits of this single chapter, to discuss at length all the matters, or examine all the cases, relating to remedies, practice, pleading and evidence in suits upon insurance contracts. If it were even possible to do this it would not be desirable, for the various States have different methods of procedure and remedies and practice are not uniform; many of the decisions involve local questions only, and are of no general value. We can only refer to certain primary rules and cite authorities bearing on general principles, leaving the practitioner to supplement what may here be said by reference to local statutes and decisions. There is no reason why remedies, or pleadings, or evidence in suits upon insurance contracts should be exceptions and governed by special rules. In fact, the same fundamental and general principles apply to remedies upon insurance policies as to those upon other contracts. The cases here to be referred to or examined are simply the application of general principles to individual, or special,

conditions of facts. We have necessarily, in the preceding chapters, often spoken incidentally, and sometimes directly, of many matters which, perhaps, might have been more properly reserved until now, for it is difficult to omit reference to questions of remedies, procedure or evidence, when they have been discussed in connection with other subjects. What is to be here written, therefore, may sometimes be supplementary to what has gone before and it is to be taken in connection therewith. The various matters considered in this chapter are also, to a great extent, inharmonious and disjunctive, but it seemed best to here collect all the cases of general value bearing on points not before discussed, as well as those relating to the subjects mentioned in the title.

§ 441. **Parties and Forms of Action in Suits by or against Voluntary Associations.**—In what way suits shall be brought by or against voluntary, unincorporated associations, and whether all the members of such society shall be made parties, or only its president or treasurer, is sometimes regulated by statute;<sup>1</sup> but generally the questions of parties and form of action are determined as in ordinary cases. Voluntary associations are recognized by the common law and the right of members to sue in behalf of themselves and others in matters pertaining to or affecting their common interests has been sustained.<sup>2</sup> In what way benefit societies, if voluntary associations merely, are to be sued or are to sue, depends upon whether the controversy is internal, as where a member sues, or external, as where an outsider sues or is sued by the society. How actions are to be brought also depends upon the way in

<sup>1</sup> Laws N. Y. 1851, ch. 455, § 1; *Ebbinghausen v. Worth Club*, 4 Abb. N. C. 300; *Austin v. Searing*, 16 N. Y. 112.

<sup>2</sup> *Beatty v. Kurtz*, 2 Pet. 566; *Mears v. Moulton*, 30 Md. 142; *Fells v. Read*, 3 Ves. 70; *Lloyd v. Loaring*, 6 Ves. 773; *Babb v. Reed*, 5 Rawle, 151.

which the association is regarded, whether as an acting corporation or partnership. Of these questions we have already spoken.<sup>1</sup> A lodge is not liable in an action for an act of wrong, outside of the declared and real purpose of the association, for such wrongful act stands by itself to be answered for only by those who joined in its perpetration.<sup>2</sup> If slanderous words are spoken by a lodge, or mutual association, of a member, as by adopting a resolution containing the objectionable language, an action will not lie against the association as a partnership, but the redress is against the wrong-doers in their individual capacity.<sup>3</sup> And where a committee, appointed by an incorporated lodge of a mutual aid society to investigate certain bills incurred for expenses in sickness and presented by a member for payment, but not specially directed to make a printed report, did make a printed report which contained libelous matter in reference to such member and placed copies thereof on the secretary's desk at a regular meeting of the society; and members took copies of the same, which afterwards came into the hands of persons not members; and the society afterwards adopted the report: it was held<sup>4</sup> that there was no publication by the society of such libelous report to render it liable therefor, but whatever was done in relation to its being circulated and printed was the individual acts of the committee and of certain members. Words spoken in the lodge room, reports of committees, or resolutions adopted by the lodge, that are slanderous or libelous, are as a rule privileged, although by a malicious publication certain members responsible therefor might be

<sup>1</sup> *Ante*, §§ 27 *et seq*; *Lindley in Partnership*, bk. 1, ch. 1, § 5; *Snow v. Wheeler*, 113 Mass. 179; *McKinley v. Irvine*, 13 Ala. 681, 706; *McMahon v. Rauhr*, 47 N. Y. 67.

<sup>2</sup> *Snow v. Wheeler*, 113 Mass. 179.

<sup>3</sup> *Gilbert v. Crystal Fountain Lodge (Ga.)*, 4 S. W. Rep. 905.

<sup>4</sup> *De Senancour v. Societe La Prevoyance (Mass.)*, 6 N. Eng. Rep. 270; 16 N. East. Rep. 553.

personally liable.<sup>1</sup> It is unnecessary, however, to here consider further this and similar questions. Equity takes cognizance of the affairs of voluntary associations, and grants relief by treating them as partnerships, or by looking into the scheme and compelling conformity to it; or reforming it and enforcing it; or if the plan is deemed impracticable, decreeing a dissolution and distributing the funds; and, speaking generally, it redresses, as far as it can, the grievances of the members of these societies who complain to it of injustice affecting their pecuniary interests therein. The general rules of equity apply and benefit societies in the eye of the law, are, if not incorporated, to be governed and aided, or wound up and their affairs settled, as in the case of other voluntary associations.<sup>2</sup> If a bill is filed to distribute the funds of a voluntary association formed for social or charitable purposes among its members, a decree will not be granted unless it clearly appears that its operations have ceased, its objects entirely failed and its purposes abandoned.

**§ 442. Remedies of Members of Benefit Societies Unlawfully Expelled: Jurisdiction of Equity: Mandamus: Action for Damages.** — The courts have frequently been called upon to restore members of benefit societies who have been expelled unlawfully, or are threatened with unlawful expulsion. In another place<sup>4</sup> we have considered the general principles governing the expulsion, or discipline, of members of incorporated and unincorporated societies, and it is not necessary to again refer to them. We

<sup>1</sup> *Shurtleff v. Stevens*, 51 Vt. 501; *Kirkpatrick v. Eagle Lodge*, 26 Kan. 384.

<sup>2</sup> *Van Houten v. Pine*, 36 N. J. Eq. 133; *Pearce v. Piper*, 17 Ves. 1; *Lindley on Partnership*, bk. IV; *ante*, § 27.

<sup>3</sup> *Roper v. Burke*, 83 Ala. 193; 3 S. Rep. 439; *Burke v. Roper*, 79 Ala. 138; *Strickland v. Pritchard*, 37 Vt. 324; *Robbins v. Waldo Lodge*, 78 Me. 565; 7 Atl. Rep. 540; 3 N. Eng. Rep. 398; *Hinkley v. Blethen*, 78 Me. 221.

<sup>4</sup> *Ante*, § 95 *et seq.*



may, however, here repeat the rules that if the lodge, or expelling tribunal, has jurisdiction, if the by-law defining the offense and punishment are valid, and the proceedings of the lodge, or its tribunal, are regular, the action thus taken is final. Neither courts of law, nor those of equity will in such case examine into the merits of the case. The only questions to be considered are: 1. Did the lodge, or its tribunal, have jurisdiction and proceed regularly? 2. Was the by-law establishing the offense and prescribing the punishment valid? If these questions be answered affirmatively the civil courts will proceed no further. If a member of a benefit society is either wrongfully threatened with expulsion, or has been unlawfully expelled, he may resort to the courts of equity and enjoin the unlawful proceedings or invoke assistance in being restored.<sup>1</sup> The court will, however, only look so far into the case as to satisfy itself whether there has been an arbitrary or capricious exercise of power, or whether the society had jurisdiction, or the by-law under which it acted was valid; if it finds that there was jurisdiction, and a valid by-law and no abuse of power, it will not interfere.<sup>2</sup> In a case in England,<sup>3</sup> where the question was as to the good faith of the governing committee, five out of its eighteen members were allowed to testify that they acted *bona fide*, and were not influenced

<sup>1</sup> *Gregg v. Mass. Med. Soc.*, 111 Mass. 185, *contra*.

<sup>2</sup> *Ante*, § 108; *Dawkins v. Antrobus*, 17 Ch. D. 615; 44 L. T. 557; 29 W. R. 511; *Hopkinson v. Exeter (Marquis)*, 5 L. R. Eq. 63; 37 L. J. Ch. 173; 16 W. R. 266; *Richardson-Gardner v. Freemantle*, 24 L. T. 81; 19 W. R. 256; *Littleton v. Blackburne*, 45 L. J. Ch. 219; 33 L. T. 641; *Labouchere v. Wharnccliffe (Earl)*, 13 Ch. Div. 346; 41 L. T. 638; 28 W. R. 367; *Fisher v. Keane*, 11 Ch. Div. 353; 49 L. J. Ch. 11; 41 L. T. 335; *Leech v. Harris*, 2 Brewst. 571; *Riddell v. Harmony F. Co.*, 8 Phila. 310; *Sperry's Appeal*, 116 Pa. St. 391; 9 Atl. Rep. 478; 8 Cent. Rep. 215; *Loubat v. Leroy*, 15 Abb. N. C. 1 and note; *Olery v. Brown*, 51 How. Pr. 92; *Fritz v. Muck*, 62 How. Pr. 69; *Van Houten v. Pine*, 36 N. J. Eq. 133 and note.

<sup>3</sup> *Richardson-Gardner v. Freemantle*, 24 L. T. (N. S.) 81; 19 W. R. 256.

by the other party to the controversy. In another case<sup>1</sup> the court declined to take the plaintiff's assertion that in his belief, or in his suspicion, the committee acted capriciously in expelling him, in view of the fact that the committee, when called upon, swore that they had not exercised their power capriciously, unjustly, maliciously or corruptly, and gave their reasons. The most appropriate remedy for a member of a society wrongfully expelled is by a proceeding in *mandamus* to compel his restoration.<sup>2</sup> There are numerous very early instances of a resort to this remedy in the United States,<sup>3</sup> and it has always been regarded as particularly effective and complete.<sup>4</sup> If the association is one having no property, and no property right is affected, and no personal injury is inflicted, it is doubtful whether a member however unjustly or summarily expelled, can be restored, by *mandamus*,<sup>5</sup> or indeed has any remedy whatever.<sup>6</sup> The rules applying to ordinary proceedings in *mandamus* and the practice in such cases are to be followed by members of societies and lodges who invoke this potent and summary remedy. The petition, alternate writ and peremptory writ must be sufficient in these as in other cases, and the hearing is the same. The general rule, already

<sup>1</sup> *Lyttleton v. Blackburne*, 45 L. J. Ch. 219; 33 L. T. (N. S.) 641.

<sup>2</sup> *Ante*, § 109.

<sup>3</sup> *Delacey v. Neuse Riv. Nav. Co.*, 1 Hawks, 274; 9 Am. Dec. 636 (1820); *Green v. African, etc., Soc.*, 1 S. & R. 254 (1815).

<sup>4</sup> *State ex rel. Sibley v. Cartaret*, 40 N. J. L. 295; *State ex rel. Waring v. Georgia Med. Soc.*, 38 Ga. 608; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 86; *Commonwealth v. Penn. Ben. Inst.*, 2 S. & R. 141; *Medical & Surg. Soc. v. Weatherly*, 75 Ala. 248; *Fuller v. Plainfield, etc.*, 6 Conn. 532; *State v. Adams*, 44 Mo. 585; *People v. N. Y. Benev. Soc.*, 3 Hun, 361; *Manning v. San Antonio Club*, 63 Tex. 166; *Evans v. Phila. Club*, 50 Pa. St. 107.

<sup>5</sup> *Sale v. First Reg. Baptist Ch.*, 62 Ia. 26; 49 Am. Rep. 136; *Rigby v. Connol*, 28 W. R. 650; *Manning v. San Antonio Club*, 63 Tex. 166; *White v. Brownell*, 4 Abb. Pr. (N. S.) 162; 2 Daly, 358; *Fritz v. Muck*, 62 How. Pr. 69; *People v. German, etc., Ch.*, 53 N. Y. 103.

<sup>6</sup> *Hardin v. Trustees Second Baptist Ch.*, 51 Mich. 137.

referred to, governs here also that the court upon the hearing will only inquire as to the jurisdiction of the lodge, or expelling tribunal, not into the merits of the case. This is a principle well established and adhered to.<sup>1</sup> In order to enable the court to judge whether the society had jurisdiction, the return to an alternate writ of *mandamus* must set forth distinctly and in detail all the facts relating to conviction, both as to the accusation, or charge, and the methods and mode of proceeding. It is not enough to state in general terms that the member expelled was guilty of a violation of duty, the charges must be specific.<sup>2</sup> The return must be exact and full and state facts, not legal conclusions;<sup>3</sup> and these facts must not be set forth argumentatively, inferentially, or evasively, but with certainty to a common intent.<sup>4</sup> It is enough in pleading a by-law to set out its legal effect without reciting its exact language, and under such a pleading the by-law itself may be put in evidence.<sup>5</sup> Notice is not sufficiently proved by the testimony of a witness that he served upon the accused member a written notice to appear at a particular time, where he also testifies that he cannot say what the notice was, as he handed it to the accused without reading it to him, and it was written by an officer of the society who was not examined.<sup>6</sup> The Supreme Court of Michigan has said:<sup>7</sup> "The only ground on which this court can interfere with

<sup>1</sup> *Commonwealth v. Beneficial Soc.*, 8 W. & S. 247; *Toram v. Howard Ben. Assn.*, 4 Barr, 519; *Sperry's Appeal*, 116 Pa. St. 391; 9 Atl. Rep. 478; 9 Cent. Rep. 215; *People v. St. George's Soc.*, 28 Mich. 261; *ante*, § 109.

<sup>2</sup> *Commonwealth v. Guardians of the Poor, etc.*, 6 S. & R. 469.

<sup>3</sup> *Rex v. Mayor of Coventry*, 2 Salk. 430; *Rex v. Mayor of Abington*, 2 Salk. 432; *Rex v. Mayor of Liverpool*, 2 Burr. 731; *Green v. African, etc., Soc.*, 1 S. & R. 254; *Commonwealth v. German Soc.*, 15 Pa. St. 251.

<sup>4</sup> *Commonwealth v. Commissioners, etc.*, 37 Pa. St. 277; *Rex v. Gas-kin*, 8 Durnf. & E. 209; *Society, etc., v. Meyer*, 52 Pa. St. 125.

<sup>5</sup> *Kehlenbeck v. Logeman*, 10 Daly, 447.

<sup>6</sup> *Downing v. St. Columbia's Soc.*, 10 Daly, 262.

<sup>7</sup> *Burt v. Mich. Grand Lodge, etc.*, 9 West. Rep. 559; 33 N. W. Rep.

organized bodies by *mandamus* in aid of a member, is that as corporations they are subject to our judicial oversight to prevent their depriving members of corporate privileges illegally. Where such bodies are not corporations, or where the question presented does not involve tangible and valuable corporate privileges, we cannot interfere in this way. A person who is wronged, if he has a legal cause of action, may pursue it in the appropriate action for damages against the persons who wrong him, but *mandamus* cannot lie." Where the member of a beneficial association was entitled to notice before expulsion, but was expelled without notice and in his absence, it was held, in Pennsylvania, that he could recover damages commensurate with the extent of the injury caused by his expulsion.<sup>1</sup> And if one excludes a member of a religious society from the proper enjoyment of the property for religious worship and instruction he can maintain an action therefor, and in fixing his damages the injury to his feelings may be considered.<sup>2</sup> The right of a member of an incorporated or unincorporated society to bring his action at law for damages sustained because of unlawful expulsion never seems to have been questioned and it is only incidentally in other proceedings that this right has been referred to.<sup>3</sup> If, however, a member of a benevolent society brings a civil action to recover damages for the loss of his rights and privileges as such member, occasioned by the expulsion, the bringing of such action is a waiver of his rights to a *mandamus* to restore him to his rights and privileges of membership.<sup>4</sup> Ordinarily, one partner cannot sue his copartners at law, but in the case above stated, of a member of a voluntary association suing for damages for unlawful expulsion, the

<sup>1</sup> Washington Ben. Soc. v. Bacher, 20 Pa. St. 425.

<sup>2</sup> People v. German U. Ev. Ch., 53 N. Y. 103.

<sup>3</sup> See cases last cited.

<sup>4</sup> State v. Lipa, 28 Ohio St. 665.

suit for damages is an election to remain an outsider and the action is maintained on that theory.

§ 443. **Limitations in Policies on Time Within which Action Must be Brought Thereon: or as to Place of Bringing Suit, or as to Issue of Execution.** — The contract of insurance being a voluntary one, the insurers have the right to designate the terms upon which they will be responsible for losses. It has accordingly been held that a condition in a policy of insurance that no action against the insurers on the policy shall be sustained unless commenced within a certain time, as for example, twelve months, after the loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted, if an action for its enforcement be subsequently commenced, is valid and is not against the policy of the statute of limitations.<sup>1</sup> In some States laws exist specially relating to the time within which ac-

<sup>1</sup> *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *Veth v. Clinton F. Ins. Co.*, 30 Fed. Rep. 668; *Friezin v. Allemania F. Ins. Co.*, *Id.* 352; *O'Laughlin v. Union M. L. Ins. Co.*, 11 Fed. Rep. 280; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *Williams v. Mut. Ins. Co.*, 20 Vt. 222; *Wilson v. Etna Ins. Co.*, 27 *Id.* 99; *N. W. Ins. Co. v. Phoenix Oil Co.*, 31 Pa. St. 449; *Brown v. Savannah Ins. Co.*, 24 Ga. 101; *Portage Ins. Co. v. West*, 6 Ohio St. 602; *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 608; *Fullam v. N. Y. Ins. Co.*, 7 Gray, 61; *Carter v. Humboldt Ins. Co.*, 12 Ia. 287; *Stout v. City Ins. Co.*, *Id.* 371; *Ripley v. Etna Ins. Co.*, 30 N. Y. 136; 29 Barb. 552; *Gooden v. Amoskeag Co.*, 20 N. H. 73; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394; *Same v. Same*, 7 *Id.* 301; *Ames v. New York Ins. Co.*, 4 Kern. 252; *Roach v. N. Y. & Erie Ins. Co.*, 30 N. Y. 546; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38; *Carraway v. Merchants' M. Ins. Co.*, 26 La. 298; *Merchants M. Ins. Co. v. La Croix*, 35 Tex. 249; *Cornett v. Phoenix Ins. Co.*, 67 Ia. 388; *Underwriters Agency v. Sutherland*, 55 Ga. 266; *Wilkinson v. First Nat. Ins. Co.*, 72 N. Y. 499; *Glass v. Walker*, 66 Mo. 32; *Lasker v. Kenton Ins. Co.*, 58 N. H. 469; *Farmers', etc., Ins. Co. v. Barr*, 94 Pa. St. 345; *Universal F. Ins. Co. v. Weiss*, 106 Pa. St. 20; *Contra*, *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Wilson v. State F. Ins. Co.*, 7 Low. Can. J. 223. And the right is questioned in *Westchester F. Ins. Co. v. Dodge*, 44 Mich. 420.

tions on insurance policies shall be brought. In such case the statute governs as to all policies thereafter issued.<sup>2</sup> The action mentioned in the condition (which must be commenced within the twelve months) must be the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case; although such previous action was commenced within the period prescribed.<sup>3</sup> The time taken in attempting to sue a domestic company in a foreign jurisdiction is not to be deducted from the time allowed by the policy in suing on it;<sup>4</sup> and an action is not begun within the limitation unless the court in which proceedings were instituted had jurisdiction.<sup>5</sup> The limitation concerning the time within which suits must be brought does not apply to actions to recover money paid as premiums, but only to actions on the policy,<sup>6</sup> nor does it apply to actions against the stockholder of a company,<sup>7</sup> nor to one who holds the policy as collateral security, if the condition is in the charter of a mutual company;<sup>8</sup> nor to proving up a claim before a master.<sup>9</sup> And the limitation is not binding when it depends upon a condition which either party to it may defeat,<sup>9</sup> as, for example, that no suit shall be brought until the case has been submitted to arbitration,

<sup>1</sup> *Dolbier v. Agricultural Ins. Co.*, 67 Me. 180; *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Ins. Co. N. A. v. Brim*, 111 Ind. 281; 12 N. East. Rep. 315; 9 West. Rep. 830.

<sup>2</sup> *Riddlesbarger v. Hartford Ins. Co.*, 7 Wall. 386; *O'Laughlin v. Union Cent. L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280; *McFarland v. Aetna Ins. Co.*, 6 W. Va. 437; *Brown v. Roger Williams Ins. Co.*, 7 R. I. 301; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462; *Wilson v. Aetna Ins. Co.*, 27 Vt. 99. See *Madison Ins. Co. v. Fellowes*, 1 Dis. 217; *aff'd* 2 Dis. 128.

<sup>3</sup> *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188.

<sup>4</sup> *Keystone M. B. Assn. v. Norris*, 19 W. N. C. 248.

<sup>5</sup> *Waller v. Northern Assn. Co.*, 64 Ia. 101.

<sup>6</sup> *Davis v. Stewart*, 26 Ohio St. 643.

<sup>7</sup> *Smith v. Atlantic, etc., Ins. Co.*, 1 Brun. Coll. Cas. 578; 12 Law Rep. 408.

<sup>8</sup> *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

<sup>9</sup> *Leach v. Republic F. Ins. Co.*, 58 N. H. 245.

for either party may refuse to so submit. Nor does the condition apply when suit is brought on the adjustment of the loss, for the action is on the independent agreement, though it rests in parol.<sup>1</sup> An action originally brought within the prescribed time is not affected by an amendment changing the plaintiff,<sup>2</sup> or the defendant, if it appeared,<sup>3</sup> for in such case the amendment relates back to the institution of the suit. A suit is commenced when the precipe is filed and the summons issued.<sup>4</sup> A stipulation in a policy that no execution shall issue on a judgment obtained against the company until a certain period after the rendition thereof is valid. Such a provision in the charter of a mutual company was sustained, although the judgment upon which the execution was sought was founded upon a foreign judgment obtained a long time before.<sup>5</sup> A stipulation or condition in a policy that suit shall be commenced in a certain court has been held to be void as against public policy.<sup>6</sup> And a condition that if the insured is not satisfied with the adjustment, he may bring, or must bring, his suit to a certain court within a certain time, does not apply where the loss was not adjusted.<sup>7</sup> Where the policy limited the time of suit to a year after an award should be obtained under its terms, the court intimated, in an action to reform the policy and for a

<sup>1</sup> *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85; *Ill. M. F. Ins. Co. v. Archdeacon*, 82 Ill. 236.

<sup>2</sup> *Fame Ins. Co. v. Thomas*, 10 Bradw. 545; *aff'd* 108 Ill. 91; *United States Ins. Co. v. Ludwig*, 108 Ill. 514.

<sup>3</sup> *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 467.

<sup>4</sup> *Schroeder v. Merchants', etc., Ins. Co.*, 104 Ill. 71.

<sup>5</sup> *Judkins v. Union Mut. F. Ins. Co.*, 39 N. H. 172.

<sup>6</sup> *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518; *Indiana, etc., Ins. Co. v. Routledge*, 7 Ind. 25; *Nute v. Hamilton, etc., Ins. Co.*, 6 Gray, 174; *Amesbury v. Bowditch, etc., Ins. Co.*, *Id.* 596; *Hall v. People's, etc., Ins. Co.*, *Id.* 185.

<sup>7</sup> *Landis v. Home, etc., Ins. Co.*, 56 Mo. 591; *Nevins v. Rockingham M. F. Ins. Co.*, 25 N. H. 22; *Williams v. New England F. Ins. Co.*, 29 Me. 465; *Bartlett v. Union M. L. Ins. Co.*, 46 Me. 500; *Boynnton v. Middlesex, etc., Ins. Co.*, 4 Met. 212.

recovery thereon as reformed, that it was doubtful whether the limitation applied, except where an award had fixed the amount of the claim.<sup>1</sup>

§ 444. **When the Statute of Limitations Applies.**— If no limitation is imposed by the policy the ordinary statutes of limitation apply. In a case where no certificate was issued and the right of the beneficiary of a benefit society was defined by the laws of the same it was held that the statute of limitations upon actions upon parol agreements applied.<sup>2</sup> In Georgia, however, it was held by the Supreme Court, in a case where the defendant was incorporated for insuring lives, and the charter provided that the amount due at a member's death should be paid in a specified way, that the statute of limitations in regard to enforcement of rights accruing to individuals under statutes, acts of incorporation, or operation of law applied, because the liability was statutory, resting on the defendant's charter.<sup>3</sup> Where the existence of a policy was concealed from the insured by the agent of the company for over six years, although he had received it to be delivered to the insured, it was held that the force of the statute of limitations could not be avoided by pleading the fraud, since by so doing the plaintiff would be put in the position of suing on a contract consummated by concealed delivery.<sup>4</sup> If a policy on the life of the debtor be assigned to the creditor on condition that no steps be taken to collect the debt during the life of such debtor, the statute of limitations will not commence to run against the debt until the death of the debtor.<sup>5</sup> A company doing business in a State is considered as fully

<sup>1</sup> *Hay v. Star F. Ins. Co.*, 77 N. Y. 235.

<sup>2</sup> *Kauz v. Improved Order, etc.*, 13 Mo. App. 341.

<sup>3</sup> *Georgia Masonic Ins. Co. v. Davis*, 63 Ga. 471.

<sup>4</sup> *Morrison v. Ins. Co., etc.* (N. H.), 7 Atl. Rep. 378; 8 N. Eng. Rep 160.

<sup>5</sup> *Damron v. Penn. M. L. Ins. Co.*, 99 Ind. 478.



domiciled there for the purpose of being sued and may rely on the statute of limitations.<sup>1</sup>

§ 445. **When the Limitations do Not Attach: Waiver: Excuses for Not Bringing Suit.** — The right of a member of a mutual company is not affected by a by-law in force when his policy was obtained, unless it is made a part of the policy.<sup>2</sup> And if the delay to bring suit within the designated period is a result to which the company mainly contributed by holding out hopes of amicable adjustment, it will not be allowed to take advantage thereof. The limitation of the policy will also be disregarded if insured is prevented from bringing his suit by fraud or the insurer's holding out reasonable hopes of settlement;<sup>3</sup> and the limitation may be waived after the action is legally barred.<sup>4</sup> If within the time limited for suit the insurer promise conditionally to pay the amount at a future date, this intervening time is excluded in calculating the period of limitation,<sup>5</sup> or if the acts and omissions of the company delay the insured in making proofs, for say five months, suit on the policy being barred a certain time after loss, this period of five months is to be excluded in computing the time within which action must be brought.<sup>6</sup> When, however, all negotiations were ended, two months before the time limited for suit had elapsed, it was held that no excuse existed justifying the court in sustaining an action brought six months

<sup>1</sup> *Conn. M. L. Ins. Co. v. Duerson*, 28 Gratt. 630.

<sup>2</sup> *Mutual Accident, etc., Ass. v. Kayser*, 14 W. N. C. 86.

<sup>3</sup> *Derrick v. Lamar Ins. Co.*, 74 Ill. 404; *Little v. Phoenix Ins. Co.*, 123 Mass. 389; *Home Ins., etc., Co. v. Myer*, 93 Ill. 271; *Martin v. State Ins. Co.*, 44 N. J. L. 485; *St. Paul, etc., v. McGregor*, 63 Tex. 399; *Bish v. Hawkeye Ins. Co.*, 69 Ia. 184; *Solomon v. Metropolitan Ins. Co.*, 10 Jones & Sp. 22; *Curtis v. Home Ins. Co.*, 1 Biss. 485; *Ripley v. Astor Ins. Co.*, 17 How. Pr. 444; *Mickey v. Burlington Ins. Co.*, 35 Ia. 174.

<sup>4</sup> *Coursin v. Penn. Ins. Co.*, 46 Pa. St. 323.

<sup>5</sup> *Black v. Winnesheik Ins. Co.*, 31 Wis. 74.

<sup>6</sup> *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472.

after the limit expired;<sup>1</sup> and mere negotiations are not sufficient to show a waiver of the condition as to time of suit;<sup>2</sup> nor even a promise to pay, if withdrawn four months before time limited for suit elapsed.<sup>3</sup> Ignorance of the provision as to limitation in the policy of the time of bringing suit is no excuse, although the policy had not been delivered;<sup>4</sup> nor is a mistake in the policy as to the time the risk commenced;<sup>5</sup> nor representations of an agent, the policy negating his authority;<sup>6</sup> nor is this condition affected by a waiver of other conditions in the policy;<sup>7</sup> nor by the non-receipt of a notice of the disallowance of the claim duly mailed;<sup>8</sup> nor by the fact that the beneficiaries are minors;<sup>9</sup> nor is the limitation waived by an offer of compromise;<sup>10</sup> nor the failure and neglect of the company to adjust the loss;<sup>11</sup> nor a promise of the insurer to write and inform the insured what the company proposed to do.<sup>12</sup> Whether war is an excuse for not bringing suit is doubtful. The Supreme Court of the United States has held in the affirmative<sup>13</sup> but there is authority to the contrary.<sup>14</sup> And so in regard to the absence of the defendant so that process cannot be served upon him. In such a case the Supreme

<sup>1</sup> *Blanks v. Hibernia Ins. Co.*, 36 La. Ann. 599.

<sup>2</sup> *Allemania Ins. Co. v. Little*, 20 Bradw. 431; *Phoenix Ins. Co. v. Lebercher*, *Id.* 450.

<sup>3</sup> *Garretson v. Hawkeye Ins. Co.*, 65 Ia. 468.

<sup>4</sup> *Wilkensen v. First National Ins. Co.*, 72 N. Y. 499.

<sup>5</sup> *Farmers' M. F. Ins. Co. v. Barr*, 94 Pa. St. 345.

<sup>6</sup> *Waynsboro, etc., Ins. Co. v. Conover*, 98 Pa. St. 384.

<sup>7</sup> *Universal, etc., Ins. Co. v. Weiss*, 106 Pa. St. 20.

<sup>8</sup> *Higgins v. Windsor, etc., Ins. Co.*, 54 Vt. 270.

<sup>9</sup> *O'Laughlin v. Union Central L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280.

<sup>10</sup> *Davis v. Canada, etc., Ins. Co.*, 39 Up. Can. Q. B. 452.

<sup>11</sup> *Dutton v. Vermont M. F. Ins. Co.*, 17 Vt. 369.

<sup>12</sup> *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Same v. Aetna Ins. Co.*, *Id.* 437.

<sup>13</sup> *Semmes v. Insurance Co.*, 13 Wall. 158; reversing *s. c.* 36 Conn. 543.

<sup>14</sup> *Phoenix Ins. Co. v. Underwood*, 12 Heisk. 424. See *ante*, § 356.

Court of Michigan<sup>1</sup> held that although the first summons was not served because of the absence of the defendant, a second summons issued after the limit of time had expired, was in time, irrespective of the question whether it was a continuation of the first summons.<sup>2</sup>

**§ 446. When Time of Limitation Begins to Run.**— A question, arising more frequently in cases of fire than of life insurance is when does the time within which a suit must be brought begin to run. The preponderance of authority is to the effect that it dates from the time when an action might first be brought, as, when the loss is payable so many days after proof of loss, from the lapse of this period after the submission of proofs or the adjustment. And this, although by the terms of the contract suit must be brought so many months after the loss should occur.<sup>3</sup> If proofs of loss are waived, the time of limitation dates from the expiration of the same stipulated number of days after such waiver as after proofs.<sup>4</sup>

**§ 447. Condition of Limitation, how Taken Advantage of.**— The proper practice is to plead the contract limitation, and not to attempt to take advantage of it by

<sup>1</sup> *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202.

<sup>2</sup> *Ketchum v. Prot. Ins. Co.*, 1 Allen (N. B.), 136, seems opposed to this view.

<sup>3</sup> *Ellis v. Council Bluff Ins. Co.*, 64 Ia. 507; *Chandler v. St. Paul, etc., Ins. Co.*, 21 Minn. 85; *Hay v. Star F. Ins. Co.*, 77 N. Y. 235; *Mayor, etc., v. Hamilton Ins. Co.*, 39 N. Y. 46; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *Mut., etc., Assn. v. Kayser*, 14 W. N. C. 86; *Barber v. F. & M. Ins. Co., etc.*, 16 W. Va. 658; *Spare v. Home Mut. Ins. Co.*, 9 Sawy. 142; 17 Fed. Rep. 568; *Friezen v. Allemania Ins. Co.*, 30 Fed. Rep. 352; *Miller v. Hartford F. Ins. Co.*, 70 Ia. 704; 29 N. W. Rep. 411; *Owen v. Howard Ins. Co.*, 9 Ky. L. Rep. 147. To the contrary are, *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Humboldt Ins. Co. v. Johnson*, 91 Ill. 92; 1 Bradw. 309.

<sup>4</sup> *Eggleston v. Council Bluff Ins. Co.*, 65 Ia. 308.

demurrer,<sup>1</sup> and if the suit is not commenced within the stipulated time, the fact is sufficiently pleaded by an allegation that the conditions of the policy have not been complied with.<sup>2</sup> If the answer, after setting forth the conditions of the policy, avers that more than the stipulated number of months have elapsed since the making of any claim for loss, it will be sufficient to enable defendant to avail itself of the defense that the suit was not brought within the prescribed time.<sup>3</sup> The objection that the action was not brought in time cannot be raised by plea in abatement;<sup>4</sup> nor can it be set up, if having been interposed by plea, a demurrer has been sustained to it;<sup>5</sup> nor after verdict.<sup>6</sup>

**§ 448. Condition of Limitation on Time of Bringing Suit not Usual in Life Insurance Policies: Construction.**—This condition, limiting the time within which an action is to be brought on the policy, is not as usual in fire as in life insurance contracts. We have referred to the subject briefly, endeavoring to concisely state general principles without elaboration or argument, because the cases relate almost entirely to fire insurance policies. By analogy the reasoning found in these precedents applies to life insurance contracts. The cases all show that in construing the language of this stipulation, the same rules are observed as interpreting other conditions of the policy; it is construed liberally in favor of the assured and strongly

<sup>1</sup> *Barber v. F. & M. Ins. Co., etc.*, 16 W. Va. 658; *Ketchum v. Protection Ins. Co.*, 1 Allen (N. B.), 136.

<sup>2</sup> *O'Laughlin v. Union Central L. Ins. Co.*, 3 McC. 543; 11 Fed. Rep. 280. This rule, however, may be modified by statute or local requirements and cannot be taken as applying in all cases.

<sup>3</sup> *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594.

<sup>4</sup> *Smith v. Atlantic, etc., Ins. Co.*, 1 Brun. Coll. Cas. 573; 12 L. R. 408.

<sup>5</sup> *Humboldt Ins. Co. v. Johnson*, 1 Bradw. 309.

<sup>6</sup> *Caldwell v. Stadacona, etc., Ins. Co.*, 3 Russ. & G. (Nova S.) 218.

against the insurer. If by a strict construction the rights of the assured can be preserved the courts will adopt this course.

**§ 449. Conditions Concerning Arbitration Seldom Found in Life Insurance Policies.**—It is usual in policies of fire insurance to insert conditions and provisions in regard to arbitration if any loss arises. It has often been a disputed question whether such provisions were valid and binding, and numerous decisions have been made construing these stipulations. Such clauses in life policies are comparatively infrequent, although they are found in some contracts. With benefit societies it is not uncommon for the laws of the society to provide for a tribunal of its own to settle differences between its members and determine its liability in regard to claims. It will not be necessary for us to enter into an examination of the cases that have been decided involving the validity of arbitration clauses in fire policies except so far as they relate indirectly to the rights of those who belong to benefit societies.

**§ 450. Agreements to Refer to Future Arbitration, When and to What Extent Valid.**—It is a settled principle of law that parties cannot by contract oust the courts of their jurisdiction and agreements to refer to future arbitration will not be enforced in equity and will not be sustained as a bar to an action at law or a suit in equity. “The reason generally given,” says the Supreme Court of Massachusetts,<sup>1</sup> “is, that such an agreement affects the remedy, and, if enforced, would oust the courts of their jurisdiction. Another reason is, that a submission to arbitration is a power, and revocable at any time before it is fully executed by an award made. A party will not be compelled to enter into a submission which he can forthwith revoke; and the

<sup>1</sup> Reed v. Washington Ins. Co., 138 Mass. 575.

bringing of an action amounts to a revocation. Neither of these reasons seems to apply to an action upon a promise to pay an award. Such a promise is conditional upon the making of an award, and the arbitration is a condition to the right of action." It is well settled, that an agreement in a policy to refer all matters of dispute to arbitrators is void and ineffectual.<sup>1</sup> But it is also a well settled principle of law that, although parties cannot by contract oust the courts of their jurisdiction, any person may covenant that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the contract.<sup>2</sup> A condition in any contract to refer any question which may arise out of it to arbitration, will be, if so stated, a condition precedent to the right to sue on the contract, but unless the condition expressly stipulates that, until arbitration be had, no action shall be brought, its performance is not precedent to the right to sue on the contract.<sup>3</sup> The correct view is thus stated by Lord Coleridge in *Dawson v. Fitzgerald*<sup>4</sup> as having been laid down in a previous case:<sup>5</sup> "If two persons, whether in the same or in a different deed from that which creates the liability agree to refer the matter upon which the liability arises, to arbitration, that agreement does not take away the right of action. But if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a

<sup>1</sup> *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 70; *Trott v. City Ins. Co.*, 1 Cliff. 439; *Cobb v. New England, etc., Ins. Co.*, 6 Gray, 192; *Insurance Co. v. Morse*. 20 Wall. 445.

<sup>2</sup> *Scott v. Avery*, 5 H. of L. Cas. 811; 25 L. J. Ex. 303; 2 Jur. (N. S.) 815; affirming 8 Ex. 487; 22 L. J. Ex. 287; 17 Jur. 810; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478.

<sup>3</sup> *Roper v. London*, 1 El. & El. 825; 28 L. J. Q. B. 260; 5 Jur. (N. S.) 491; 7 W. R. 441; *Elliott v. Royal Exchange, etc.*, 2 L. R. Ex. 237; 36 L. J. Ex. 129; 16 L. T. 399; 15 W. R. 907.

<sup>4</sup> 1 Ex. D. 257; 45 L. J. Ex. 893; 35 L. T. 220; 24 W. R. 773.

<sup>5</sup> *Elliott v. Royal Exchange*, *supra*.

third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum. For to say the contrary would be to give the party a different measure or rate of compensation from that for which he has bargained.”<sup>1</sup> In insurance, agreements to submit matters in controversy to arbitration are generally invalid when they go to the root of the controversy and involve questions of law as well as fact,<sup>2</sup> or when they determine the liability of the company. But if the matters to be submitted are incidental, special, or collateral to the main question or liability, as, for example, the amount of the loss or manner of its payment, then the agreement to refer will be upheld. The subject is not without difficulty and decisions are not always in harmony, but the rule is practically as stated. As said before, the question arises more frequently in fire insurance cases, but is likely to occur in the experience of life insurance companies and benefit societies. If the promise to pay is on condition that the amount be ascertained by arbitrators, then the arbitration is a condition precedent to recovery, and performance or waiver must be shown. We refer below to the principal cases where the point has been raised and the language of various stipulations construed. In some a condition precedent has been held to exist and be valid, while in others the agreement has been considered ineffectual.<sup>3</sup> The Supreme Court of the

<sup>1</sup> Wood v. Humphrey, 114 Mass. 185; Rowe v. Williams, 97 Mass. 163.

<sup>2</sup> Alexander v. Campbell, 41 L. J. Ch. 478; 27 L. T. 25.

<sup>3</sup> In the following cases the agreement to refer was upheld as a condition precedent to suit: Old Saucelito, etc., Co. v. Commercial Union Ass. Co., 66 Cal. 253; Adams v. South British, etc., Co. (Cal.), 11 Pac. Rep. 627; Carroll v. Girard F. Ins. Co. (Cal.), 13 Pac. Rep. 863; Gauche v. London, etc., Ins. Co., 4 Woods, 102; 10 Fed. Rep. 347; Davenport v. Long Island Ins. Co., 10 Daly, 535; Cin. Coffin Co. v. Home Ins. Co., 7 Cin. L. B. 342; Flaherty v. Germania Ins. Co., 1 W. N. C. 352; Calvin v. Provincial Ins. Co., 27 Up. Can. Q. B. 403; McInnes v. Western Co., 30 Up. Can. Q. B. 580; Lantulum v. Anchor M. Ins. Co., 22 N. B. 14; Minifie v. Railway, etc., Co., 44 L. T. 552. In the following cases the agreement

District of Columbia, in the case of *Campbell v. Am. Popular L. Ins. Co.*,<sup>1</sup> considered the subject fully and sustained a provision in a life policy that the company should not be liable, if in the opinion of its surgeon-general, the death of the insured was caused by intemperance; but in that event should only be held to refund the premiums already paid. The court admitted the doctrine that in general the jurisdiction of the courts could not be ousted by an agreement of the parties to refer future differences to arbitrators, but after a review of the authorities held that this was only the reference of a collateral or special fact, and a condition precedent to recovery. The provisions in the laws of benefit societies creating a tribunal to pass upon the claims of their members have in several instances been enforced as conditions precedent to recovery. In one<sup>2</sup> the court upheld a stipulation in the laws of a society that all claims against the association should be referred to the board of directors and that a majority of the board should decide all questions of dispute and doubt and that their decision should be final. The court says: "It was certainly competent for the members of this association to agree among themselves that the action of their board of directors in reference to

has been held invalid as not being a condition precedent: *Gere v. Council Bluffs Ins. Co.*, 67 Ia. 272; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *German Am. Ins. Co. v. Steiger*, 109 Ill. 254; *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419; *Crossley v. Con. F. Ins. Co.*, 27 Fed. Rep. 30; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478; *Allegre v. Maryland F. Ins. Co.*, 6 H. & J. 408; affirmed 6 G. & J. 136; 14 Am. Dec. 289 and note; *Liverpool L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Kill v. Hollister*, 1 Wils. 129; *Mark v. National Ins. Co.*, 24 Hun, 565; 91 N. Y. 663; *Wallace v. German-American Ins. Co.*, 1 McC. 335; 2 Fed. Rep. 638; 4 McC. 123; *Commercial Union Ass. Co. v. Hocking*, 19 W. N. C. 213; *Nurney v. Firemen's Ins. Co. (Mich.)*, 30 N. W. Rep. 350; *Gorman v. Hand-in-hand Ins. Co.*, 11 Irish C. L. 224. See *May on Ins.*, § 492, *et seq.*

<sup>1</sup> 1 McC. 246; 2 Big. L. & A. I. Cas. 16.

<sup>2</sup> *Rood v. Railway Passengers', etc., Assn.*, U. S. Cir. Ct. N. D. Ill., 31 Fed. Rep. 62.



any claim presented against the association should be final.”<sup>1</sup>

§ 451. **Pleading in Actions on Insurance Contracts.** — The modern codes have largely stripped pleading of its technical character and even in States where common-law forms are retained they are modified by statute. It is not within the scope of this work to lay down anything more than general rules for pleadings in suits on life policies and even these general rules must not always be implicitly relied on, for local statutes may change or even abolish what has been established in the adjudications of the courts. The manner of declaring on policies of insurance has in many States been prescribed by statute with a view of simplifying the pleadings and taking away many technical requirements. We have not considered it necessary to discuss these local statutes, but leave it to the practitioner to acquaint himself with the rules which prevail in his own State.

§ 452. **Parties to Action on Insurance Contracts.** — Where the policy is payable to the assured, “his executors, administrators or assigns,” for the express benefit of the wife of the assured and their children, the executrix is the proper person to sue.<sup>2</sup> A husband who has insured his life for the benefit of his wife, on the failure of the company, may maintain an action in his own name to recover the premiums he has paid.<sup>3</sup> If a certificate of membership issued by a mutual association expressly covenants to pay to a

<sup>1</sup> See *Coffee v. Southwark Ben. Soc.*, 2 W. N. C. 600; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Van Poucke v. Netherland, etc., Soc.* (Mich.), 6 West. Rep. 132; 29 N. W. Rep. 863, and *ante*, § 94.

<sup>2</sup> *Mass. M. L. Ins. Co. v. Robinson*, 98 Ill. 324; *Grattan v. National L. Ins. Co.*, 15 Hun, 74; *Fairchild v. N. Eastern M. L. Assn.*, 51 Vt. 613; *Stowe v. Phinney*, 78 Me. 244; *Catland v. Hoyt*, 78 Me. 355; *Conn. L. Ins. v. Luchs*, 108 U. S. 498.

<sup>3</sup> *Universal L. Ins. Co. v. Coghill*, 30 Gratt. 72; *New York L. Ins. Co. v. Bonner*, 11 Neb. 169; *Abell v. Penn. M. L. Ins. Co.*, 18 W. Va. 400.

person named in it, such person not being a member, a sum certain in event of the death of the member to whom the certificate is issued, the beneficiary may be considered the covenantee, and is entitled to sue the company in covenant for the amount specified in the certificate.<sup>1</sup> And one for whose benefit a promise is made may sue upon it, though he is not privy to it.<sup>2</sup> If a policy, or certificate of a benefit society, provide for the payment of different sums to different parties, it is improper for the beneficiaries to join in one action to recover the several sums due, but each must bring a separate action for his share.<sup>3</sup> In such case the covenant in terms is joint, but if the interest be several the covenant will be several, although the terms of it be joint. "The rule is clearly established, that, though a man covenants with two or more persons, using words which *prima facie* import a joint covenant, yet, if the interest and cause of action of each of the covenantees appears on the face of the deed to be several, the words will be taken disjunctively, and the covenant will be construed to be a several covenant with each, and each covenantee may bring an action for his particular damage."<sup>4</sup> But if the amount of the insurance be payable to certain persons equally, there may be a different rule.<sup>5</sup>

**§ 453. Actions on Benefit Certificates and Against Benefit Societies for Benefits: Measure of Damages in Actions at Law.**—The certificates of benefit societies differ greatly in form and the style of action and method

<sup>1</sup> York County, etc., Assn. v. Myers, 11 W. N. C. 541.

<sup>2</sup> Barbaro v. Occidental Grove, etc., 4 Mo. App. 429; Beardslee v. Morgner, *Id.* 139.

<sup>3</sup> Campbell v. National Life Ass. Co., 84 Up. Can. Q. B. 35; Frazer v. Phoenix M. L. Ins. Co., 36 Up. Can. Q. B. 422; Keary v. Mut. Reserve F. L. Assn., 30 Fed. Rep. 359.

<sup>4</sup> Lane v. Drinkwater, 1 C. M. & R. 612; James v. Emery, 8 Taunt. 245.

<sup>5</sup> Covenant M. Ben. Assn. v. Hoffman, 110 Ill. 603.

of pleading must be determined by the language of the contract in each case. In some societies the certificate issued by the supreme authority, almost always a corporation, is to pay a certain amount to the designated beneficiary upon the death of the member. Where this is the case the certificate is in legal effect a policy of life insurance, governed by the rules of pleading applicable to ordinary actions on policies.<sup>1</sup> The certificates issued by other societies provide that upon the death of the member, the company shall only pay over the proceeds of certain assessments, not to exceed a stipulated amount. In such cases it is not entirely agreed what remedy is most proper, if the association, denying its liability, refuses to levy the promised assessment, for the authorities are not in harmony. On principle it seems clear that an unincorporated voluntary association cannot be sued at law as an entity for promised benefits, but the proceedings should be in equity,<sup>2</sup> and in this section, whenever actions at law against benefit societies are mentioned, it will be understood that such societies are incorporated. If the contract so provide the society can only be sued in equity on its certificate.<sup>3</sup> It has been questioned whether, if a benefit association can be sued at law for failure to levy an assessment as provided in its certificates, recovery can be for more than nominal damages. And in Iowa the Supreme Court has been positive in its rulings to the effect that only nominal damages can be recovered in such actions,<sup>4</sup> holding that if an action be brought at law for damages for refusal to levy an assessment, the measure of damages is

<sup>1</sup> *Elkhart M. B. & A. Assn. v. Houghton*, 98 Ind. 149; *post*, § 454.

<sup>2</sup> *Paul v. Keystone Lodge*, 3 W. N. C. 408; *Van Houten v. Pine*, 36 N. J. Eq. 133.

<sup>3</sup> *Eggleston v. Centennial M. L. Assn.*, 5 McC. 484; 18 Fed. Rep. 14; 19 Fed. Rep. 201.

<sup>4</sup> *Bailey v. Mutual Ben. Assn.*, 71 Ia. 689; 27 N. W. Rep. 770; *Rainsbarger v. Union Mut. A. Assn.*, 72 Ia. 191; 33 N. W. Rep. 626; *Garretson v. Equitable, etc., Assn. (Ia.)*, 38 N. W. Rep. 127. See also *Curtis v. Mut. Ben. L. Co.*, 48 Conn. 98; *Van Houten v. Pine*, 36 N. J. Eq. 133.

not the maximum sum called for in the certificate, but nominal damages only can be recovered.<sup>1</sup> In the United States Circuit Court in Missouri a different rule has been laid down and in an action on a certificate of a company it was held that recovery should be for the full amount, unless defendant proved that an assessment would not produce the full sum.<sup>2</sup> If the petition alleged that the society had collected the assessment and refused to pay it over, then recovery would certainly be for the full amount.<sup>3</sup> It has been maintained that the most effectual remedy on the certificate of a benefit society is by proceedings in equity, and in a case of this kind the Supreme Court of Illinois said:<sup>4</sup> "As the corporation is not organized for pecuniary profit, has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. And the association stands as a trustee of a fund in the hands of its numerous members, but belonging to the beneficiaries, which can be called in by assessment for their use. It would seem, then, that a court of equity might properly be resorted to as being capable of affording a more adequate remedy by directing a specific performance of the contract of the defendant by the levying of the proper assessments."<sup>5</sup> The decided preponderance of authority is in favor of the view that an action at law can be maintained against the society for a refusal or neglect to make the assessment. It is its duty to make the assessment and for the breach of this duty, imposed by the contract, if injury has resulted

<sup>1</sup> *Tobin v. Western Mut. Aid Soc. (Ia.)*, 33 N. W. Rep. 662.

<sup>2</sup> *Lueders v. Hartford L. & A. Ins. Co.*, 12 Fed. Rep. 465. See also *Supreme Council, etc., v. Anderson*, 61 Tex. 296; *Elkhart M., etc., Assn. v. Houghton*, 103 Ind. 286.

<sup>3</sup> *Smith v. Covenant M. B. A.*, 24 Fed. 685.

<sup>4</sup> *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108.

<sup>5</sup> See *Van Houten v. Pine*, 36 N. J. E. 133, *supra*.

to the beneficiary, a court of law is the most appropriate tribunal to afford him relief. The declaration, among other averments, must charge a failure or refusal to make the assessment, that if such assessment had been duly made it would have resulted in the collection of the full amount called for by the certificate, and claim that sum for damages for such failure or refusal. If either of these averments is omitted the declaration or petition is fatally defective.<sup>1</sup> While the Supreme Court of Iowa has said that, if a society refuse to levy an assessment upon its members to pay the agreed amount to the beneficiary of a deceased member, the proper remedy is by a proceeding to compel the association to make the assessment,<sup>2</sup> it does not probably refer to *mandamus*, but to the equitable remedy of specific performance. *Mandamus* is wholly inapplicable to such a case.<sup>3</sup> Even after judgment, execution on which is returned unsatisfied, it is questionable if *mandamus* to compel the officers of the defendant society to levy an assessment on its members to pay it will lie, but sequestration proceedings is the proper remedy.<sup>4</sup> After a general judgment on a benefit certificate execution cannot be limited to a particular fund.<sup>5</sup> The assessments paid

<sup>1</sup> *Earnshaw v. Sun Mut. Aid Soc. (Md.)*, 12 Atl. Rep. 884; 11 Cent. Rep. 508; *Elkhart v. M. Aid etc., Soc. v. Houghton*, 103 Ind. 286; 1 West. Rep. 284; *Taylor v. National Temperance R. Union (Mo.)*, 12 West. Rep. 92; 6 S. W. Rep. 71; *Curtis v. Mut. Ben. L. Co.*, 48 Conn. 98; *Suppiger v. Covenant M. B. Ass.*, 20 Bradw. 595; *Neskern v. N. W. End. Assn.*, 30 Minn. 406; *O'Brien v. Home Ben. Soc.*, 46 Hun, 426; *Darrow v. Family Fund Soc.*, 42 Hun, 245; *Freeman v. National Ben. Soc.*, *Id.* 252; *Burland v. N. Western Mut. Ben. Assn.*, 47 Mich. 424; *Excelsior M. Aid Assn. v. Riddle*, 91 Ind. 84; *Ball v. Granite State, etc., Assn. (N. H.)*, 9 Atl. Rep. 103; 4 N. Eng. Rep. 289; *Kansas Prot. Union v. Whitt*, 36 Kan. 761; 14 Pac. Rep. 275.

<sup>2</sup> *Rainsbarger v. Union Mut. Aid Assn.*, 72 Ia. 191; 33 N. W. Rep. 626.

<sup>3</sup> *Excelsior M. Aid Assn. v. Riddle*, 91 Ind. 84; *Burland v. N. Western M. Ben. Assn.*, 47 Mich. 424.

<sup>4</sup> *Miner v. Trustees, etc. (Mich.)*, 31 N. W. Rep. 763; 8 West. Rep. 189.

<sup>5</sup> *Seitzinger v. New Era L. Assn.*, 111 Pa. St. 557; *McKnight v. Mut. L. Assn.*, 15 W. N. C. 400.

into the treasury of a benefit society by its members become the property of the society and the members have no further claim or right to it;<sup>1</sup> and a member of the association, having no interest in the fund, cannot maintain a suit to enjoin its payment.<sup>2</sup>

§ 454. **Declaration or Petition.** — The Supreme Court of Alabama thus states the general rule in regard to a petition or declaration on an insurance policy.<sup>3</sup> “Independent of statutory provisions, the rules of pleading are the same in their application to the contract of insurance as to other contracts. The contract or policy of insurance must be declared on, in *hæc verba*, or according to its legal effect; the plaintiff’s interest in the subject of insurance; the payment of the premium; the inception of the risk; the performance of any precedent condition or warranty contained in the policy, and the loss, or happening of the event, on which within the terms and meaning of the policy the liability of the insurer attaches, must be alleged.<sup>4</sup> The general rule applicable to all executory contracts is, that if the defendant’s performance depended upon a condition precedent, the plaintiff must aver the fulfillment of such condition, whether it is affirmative or negative, or to be performed or observed by him, or the defendant, or a mere stranger to the contract, or must show an excuse for non-performance. If non-performance is excused, the matter of excuse must be distinctly averred.<sup>5</sup> These rules of pleading at common law have been modified, and to some extent abrogated by the statutory provisions to

<sup>1</sup> *Swett v. Citizens’ M. Relief Soc.*, 78 Me. 541; *York County Mut. Aid Ass. v. Myers*, 11 W.N. C. 541; *Brown v. Orr*, 112 Pa. St. 233.

<sup>2</sup> *Elsey v. Odd-fellows M. R. Soc.*, 142 Mass. 224; 7 N. East. Rep. 844; 2 N. Eng. Rep. 667.

<sup>3</sup> *Brooklyn L. Ins. Co. v. Bledsoe*, 52 Ala. 538

<sup>4</sup> 2 Greenl. Ev., § 376.

<sup>5</sup> 1 Chitty Pl. 320-26.

which we have referred. \* \* \* A mere statement of the contract or policy, followed by the general averment that the plaintiff had complied with all its provisions on on his part, and that the defendant had not in a specified matter performed it, is sufficient."<sup>1</sup> A declaration or petition is insufficient unless it alleges that the notice and proofs of loss required by the policy have been given, or compliance with this condition waived. The general averment that plaintiff has "fulfilled all the conditions" of the policy is not an averment that proofs of loss had been made in a certain way and within a certain time.<sup>2</sup> Matter in defeazance of the plaintiff's action need not be stated in the declaration, and wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, *prima facie* well founded, whether called by the name of a proviso, or a condition subsequent, it must in its nature be a matter of defense, and ought to be shown in the pleading, by the opposite party. It is sufficient to state in the declaration those parts of the contract whereof a breach is complained of, or, in other words, to show so much of the terms beneficial to the plaintiff in a contract as constitutes the point for the failure of which he sues; it is not necessary or proper to set out in the declaration other parts not qualifying or varying in any respect the material parts above mentioned. It is not necessary there-

<sup>1</sup> Richardson v. North Missouri Ins. Co., 57 Mo. 413; Bamberger v. Commercial Credit, etc., Co., 15 C. B. 676; 1 Jur. (N. S.) 500; Mass. Mut. L. Ins. Co. v. Kellogg, 82 Ill. 614; American Ins. Co. v. Leonard, 80 Ind. 272; Aetna Ins. Co. v. Kittles, 81 Ind. 96; Lingenfelter v. Phoenix Ins. Co., 19 Mo. App. 252; Daniels v. Andes Ins. Co., 2 Mont. 78; Tripp v. Vermont L. Ins. Co., 55 Vt. 100; Scheiderer v. Travelers Ins. Co., 58 Wis. 13; Continental L. Ins. Co. v. Houser, 89 Ind. 258.

<sup>2</sup> Edgely v. Farmer's Ins. Co., 43 Ia. 587; Fayerweather v. Phoenix Ins. Co., 7 N. Y. St. R. 25; Dolbier v. Agricultural Ins. Co., 67 Me. 180; Royal Ins. Co. v. Smith, 8 Ky. Law R. 521; Crescent Ins. Co. v. Camp, 64 Tex. 521; Quarrier v. Peabody Ins. Co., 10 W. Va. 507. But see Scheiderer v. Travelers' Ins. Co., 58 Wis. 13; Schobacker v. Germantown, etc., Ins. Co., 59 Id. 86; Sun Mut. Ins. Co. v. Holland, 2 Wills. (Tex.) 391.

fore for a declaration to negative matters of defense.<sup>1</sup> In a suit on a policy of life insurance, procured by the insured for the benefit of another, it is not necessary that the declaration should aver that the beneficiary had any interest in the life of the insured, but a different rule prevails where one procures an insurance on the life of another. In such case the plaintiff must aver in his declaration on the policy that he had an insurable interest in the life assured and prove the same affirmatively as a part of his case.<sup>2</sup> The mere statement that plaintiff had an insurable interest is a conclusion of law; facts must be stated from which, as a matter of law, the court can infer the existence of such an interest.<sup>3</sup> And so in an action against a benefit society to recover benefits it is not sufficient to allege that there was a "rule" whereby plaintiff was entitled, etc. The rule or its substance must be stated.<sup>4</sup> And in an action against a benefit society to recover a balance alleged to be due during the plaintiff's sickness at the rate of three dollars per week, the mere statement that such an amount is "the sum paid to the sick of said society" is insufficient and states no cause of action. In such case the plaintiff must state how the obligation to pay this money arises, what the rules and regulations in regard to beneficiaries are, and that he has com-

<sup>1</sup> *Simmons v. Insurance Co.*, 8 W. Va. 474; *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *East Texas F. Ins. Co. v. Dyches*, 56 Tex. 565; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284; *Clay F., etc., Ins. Co. v. Wusterhausen*, 75 Ill. 285; *Forbes v. Am. M. L. Ins. Co.*, 15 Gray, 249; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Conway F. Ins. Co. v. Sewall*, 54 Me. 352; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

<sup>2</sup> *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Mass. Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614; *Ruse v. Mut. Ben. L. Ins. Co.*, 23 N. Y. 516; 24 N. Y. 653; *s. c.* 8 Ga. 534; *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422; *Chrisman v. State Ins. Co. (Oreg.)*, 18 Pac. Rep. 466. But see *contra*, *Tabor v. Goss, etc., Mfg. Co. (Colo.)*, 18 Pac. Rep. 537.

<sup>3</sup> *Elkhart Mut. Aid, etc., Assn. v. Houghton*, 98 Ind. 149; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380.

<sup>4</sup> *Irish Catholic, etc., v. O'Shaughnessy*, 76 Ind. 191.



plied with such rules.<sup>1</sup> No principle is better settled, than that a statement of demand which does not state facts enough to establish the liability of the party sued, without the necessity of supplying other facts by proof, is radically defective and will not support a judgment.<sup>2</sup> It is not necessary for the plaintiff, although the application, by the terms of the policy, is made a part of the contract and the truth of the statements made therein warranted, to set out in his complaint or declaration the application, nor in the first instance to prove performance of any of its conditions, or the truth of the statements contained therein, because the agreement or warranties contained in such application are not conditions precedent, but qualifications of the liability of the insurer growing out of independent covenants and in the nature of conditions subsequent, the breach of which are matters of defense for the insurer to allege and prove.<sup>3</sup> In California and elsewhere it has been held to the contrary.<sup>4</sup>

§ 455. **Pleas, or Answers, Replications.**—The same rules apply to pleas, answers and replications in actions on insurance policies as in those on other written instruments. The books are full of instances of defective pleadings which

<sup>1</sup> *Beneficial Society v. White*, 30 N. J. L. 313.

<sup>2</sup> *Beneficial Society, etc., v. White*, *supra*.

<sup>3</sup> *Redman v. Aetna Ins. Co.*, 49 Wis. 431; *May v. Buckeye Ins. Co.*, 25 Wis. 291, where it is said that it would be intolerable, in an action on an insurance policy, to require the plaintiff to prove affirmatively in the first instance the truth of every statement usually contained in an application for insurance; *Mut. Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352; *Continental L. Ins. Co. v. Kessler*, 84 Ind. 310; *Forbes v. Am. Mut. L. Ins. Co.*, 15 Gray, 249; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Penn. Mut. L. Ins. v. Wiler*, 100 Ind. 92; *Insurance Co. v. McGookey*, 33 Ohio St. 555; *Lounsbury v. Protection Ins. Co.*, 8 Conn. 459; *Herron v. Peoria, etc., Ins. Co.*, 28 Ill. 235.

<sup>4</sup> *Bidwell v. Insurance Co.*, 3 Sawy. 261; *Gilmore v. Lycoming F. Ins. Co.*, 55 Cal., 123; *Bobbitt v. Liverpool, L. & G. Ins. Co.*, 66 N. C. 70.

were held so because the fundamental principles of pleading were disregarded. It is not necessary to particularly refer to these cases, for to do so would be unprofitable. We shall mention but a few. A general replication of waiver is bad unless it avers the facts which constitute waiver with reasonable certainty;<sup>1</sup> facts, not conclusions of law, must be averred.<sup>2</sup> If an answer set up false answers to questions in the application it must particularize them.<sup>3</sup> All matters which show the transaction to be void, or voidable in point of law, on the ground of fraud or otherwise, should be pleaded specially;<sup>4</sup> such as that the policy is a wager policy;<sup>5</sup> or, in some States, the breach of the conditions the defense relies on.<sup>6</sup>

§ 456. Evidence in Actions on Insurance Contracts. — It is not within the scope of this work to review, in connection with the reported decisions of the courts, the law of evidence in actions upon life insurance policies. To do this would require a treatise of itself. In general it may be stated that the same rules of evidence govern in actions upon policies of insurance as upon other instruments of writing. The fundamental principles which lie at the foundation of the law of evidence apply to all cases alike and the subject-matter of action is not material. In insurance cases these principles have been reaffirmed, and, though at times courts have been accused of departure from them,

<sup>1</sup> *Preston v. Travelers' Ins. Co.*, 58 N. H. 76; *Texas Banking, etc., Co. v. Hutchins*, 53 Tex. 61.

<sup>2</sup> *National Benefit Assn. v. Bowman*, 110 Ind. 355; *Gray v. National Ben. Assn.*, 111 Ind. 531; 11 N. East. Rep. 477; 9 West. Rep. 289; *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 380; *Penn. M. L. Ins. Co. v. Wiler*, 100 Ind. 92.

<sup>3</sup> *Studwell v. Charter Oak L. Ins. Co.*, 17 Hun, 602.

<sup>4</sup> *Theodore v. New Orleans, etc., Ins. Assn.*, 28 La. Ann. 917; *Meister v. Merchants' M. Ins. Co.*, Manning's Cas. (La.) 169.

<sup>5</sup> *Goodwin v. Mass. M. L. Ins. Co.*, 73 N. Y. 480.

<sup>6</sup> *Bittinger v. Providence, etc., Ins. Co.*, 24 Fed. Rep. 549.

under the supposed pressure of the equities of the case or public sentiment, it will be found that if this has been seemingly done it has been to give effect to great principles of justice without too strict a regard to mere technicalities. We shall briefly refer to some of the leading cases bearing upon the special characteristics of insurance contracts and the evidence permissible in actions for their enforcement.

§ 457. **Presumptions.** — The following presumptions, among others, have received judicial sanction: In an action to determine the legality of the proceedings by which a member has been expelled from a benefit society, every presumption is in favor of the fairness of the expulsion; <sup>1</sup> in the absence of proof it will be presumed that the person who signed an application for insurance made the representations contained therein, and knew and indorsed its contents.<sup>2</sup> Nothing appearing to the contrary, the courts of one State will presume that the common law is in force in another State; <sup>3</sup> and that the law of another State is like that of the forum; <sup>4</sup> and that acts criminal by the common law, and the laws of all civilized countries, are criminal by the laws of the States of this Union,<sup>5</sup> and that the company has knowledge of the habit of a local agent as to collection of premiums; <sup>6</sup> and that powers of agents are co-extensive with the business entrusted to them, and that a fact connected with the approval of an assignment of a policy has been communicated to the company in the due course of

<sup>1</sup> *Bachmann v. New Yorker, etc., Bund*, 64 How. Pr. 442; 12 Abb. N. C. 54.

<sup>2</sup> *Hartford L. & A. Ins. Co. v. Gray*, 80 Ill. 28; 91 Ill. 159; *Fletcher v. New York L. Ins. Co.*, 3 McC. 603; 11 Fed. Rep. 377; *N. Y. L. Ins. Co. v. Fletcher*, 117 U. S. 519.

<sup>3</sup> *Supreme Council, etc., v. Garrigus*, 104 Ind. 133.

<sup>4</sup> *Cannon v. Northwestern M. L. Ins. Co.*, 29 Hun, 470; *Neese v. Farmers' Ins. Co.*, 55 Ia. 604.

<sup>5</sup> *Cluff v. Mut. Ben. L. Ins. Co.*, 13 Allen, 308.

<sup>6</sup> *Mound City M. L. Ins. Co. v. Twining*, 19 Kan. 349.

business.<sup>1</sup> If it be shown that a person whose life is insured was intemperate after the insurance was effected the presumption is that he became so thereafter,<sup>2</sup> and if a member of an order be shown to be in good standing that he continues so;<sup>3</sup> and that every man is sane, a presumption not changed by the fact of suicide.<sup>4</sup> The presumption that a sane man found dead has not committed suicide does not apply when an insane man is so found;<sup>5</sup> and that one who violently attacked the wife of another knew that her husband would resist the assault with force. That the assailant was intoxicated does not change the presumption.<sup>6</sup> There is no presumption that, if in the application no answer appears to have been given to a question asked by the insurer, it was answered in the negative.<sup>7</sup>

**§ 458. Admissibility of Parol Evidence to Explain or Modify Answers of Assured in the Application.** — One of the most important questions in insurance law is the extent to which parol testimony is admissible to explain or modify the answers of the assured in the application, which is generally referred to in the policy and made a warranty. The stipulation often also contained in the policy that the agent procuring the insurance shall be taken to be the agent of the assured and not of the company has added a new complication. By the carelessness of insurance agents or their design, caused by anxiety to effect the insurance, false answers were often written in the application, which operated when a loss occurred to defeat the claim and frequently

<sup>1</sup> Breckenridge v. Am. Central Ins. Co., 87 Mo. 62.

<sup>2</sup> Gartside v. Conn. M. L. Ins. Co., 8 Mo. App. 592.

<sup>3</sup> Mulroy v. Knights of Honor, 28 Mo. App. 463; Ziegler v. Mut. Aid Soc., 1 McGloin (La.), 284; Supreme Lodge K. of H. v. Johnson, 78 Ind. 110.

<sup>4</sup> Weed v. Mut. Ben. L. Ins. Co., 70 N. J. 561; 9 Jones & Sp. 476.

<sup>5</sup> Germain v. Brooklyn L. Ins. Co., 26 Hun, 604.

<sup>6</sup> Bloom v. Franklin L. Ins. Co., 97 Ind. 478.

<sup>7</sup> Queen's Ins. Co. v. Legare, Ramsay's App. Cas. (Low. Can.) 369.

in a miscarriage of justice. The courts were at first disposed to strictly apply the rule that parol evidence is never admissible to explain or modify the terms of a written contract. The hardships that frequently resulted and possibly the demands of public sentiment caused the application in these cases of the doctrine of equitable estoppel, or that the assured might prove by parol a state of facts which would preclude the company from insisting upon the forfeiture for breach of warranty. It is now well settled by a preponderance of authority that the assured may show by parol that, without his fault, the answers to questions in the application were not written by him or by his authority, and that he did not know its contents when he signed it;<sup>1</sup> or that the false statement was made in the application through the fault of insurer's agent;<sup>2</sup> as where true answers were given to the medical examiner of the company, who, by its rules, was required to write down the answers himself and he wrote them incorrectly.<sup>3</sup> The Supreme Court of the United States thus states this doctrine:<sup>4</sup> "This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from

<sup>1</sup> *Hanson v. Milwaukee, etc., Ins. Co.*, 45 Wis. 321; *Continental Ins. Co. v. Pierce* (Kan.), 18 Pac. Rep. 291; *New Jersey M. L. Ins. Co. v. Baker*, 94 U. S. 610; *Lueders v. Hartford L. & A. Ins. Co.*, 4 McC. 149; 12 Fed. Rep. 465; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun, 430; *Menk v. Home Mut. Ins. Co. (Cal.)*, 14 Pac. Rep. 837; 18 *Id.* 117.

<sup>2</sup> *Ring v. Windsor, etc., Ins. Co.*, 51 Vt. 563; *McArthur v. Home L. Ins. Assn. (Ia.)*, 35 N. W. Rep. 430; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 389; *Smith v. Agricultural Ins. Co.*, 6 N. Y. St. R. 127; *Brown v. Metropolitan L. Ins. Co. (Mich.)*, 32 N. W. Rep. 610; *Hartford L. & A. Ins. Co. v. Gray*, 80 Ill. 28; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Kausal v. Minnesota, etc., Assn.*, 31 Minn. 17; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. 352; *Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

<sup>3</sup> *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281.

<sup>4</sup> *Insurance Company v. Wilkinson*, 13 Wall. 222.

using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.”<sup>1</sup> This doctrine has, however, been received in some quarters with decided disapproval and condemned as being an innovation upon the established rules of the common law. The Court of Errors and Appeals of New Jersey has perhaps most strongly opposed the rule and, after a review of the authorities,<sup>2</sup> says that the decided weight of authority is against the admission of parol evidence as a clear violation of the salutary rule of law, that all prior statements are merged in the concluded contract, and that a contract put in writing cannot be added to or altered by parol testimony.<sup>3</sup> In the latest ruling of the Supreme Court of the United States<sup>4</sup> on this question it was disposed to lay stress upon the condition that before an estoppel can be held the assured must be shown to have not been in fault or to have neglected plain means by which

<sup>1</sup> The following authorities are cited by the court or sustain its view: *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Combs v. Hannibal Savings & Ins. Co.*, 43 Mo. 148; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Clark v. Union M. F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721, and valuable note where the authorities are collected. See *ante*, § 152; § 221, *et seq.*, and § 428.

<sup>2</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

<sup>3</sup> The court cites: *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. 366; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Smith v. Cash Mut. Ins. Co.*, 24 Pa. St. 320; *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Hough v. City F. Ins. Co.*, 29 Conn. 10; *Barrett v. Union M. Ins. Co.*, 7 Cush. 175; *Lowell v. Middlesex Ins. Co.*, 8 *Id.* 127; *Jenkins v. Quincy Mut. Ins. Co.*, 7 Gray, 370; *Kibbe v. Hamilton M. Ins. Co.*, 11 *Id.* 163; *Jennings v. Chenango Co. Ins. Co.*, 2 Denio, 75; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235. See also *Southern M. Ins. Co. v. Yates*, 28 Gratt. 585. It is culpable negligence to sign an application without reading it. *Susquehanna M. F. Ins. Co. v. Swank*, 102 Pa. St. 17; *Ryan v. World M. L. Ins. Co.*, 41 Conn. 168.

<sup>4</sup> *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519.

he might have known of the mistake in the application, as where a copy of the application was attached to the policy.<sup>1</sup>

§ 459. **Declarations of Agent.** — The general principle applies in insurance as in other cases that the declarations of an agent to be admissible in evidence must have been made in the line of his agency and in the course of the discharge of the duty he owes to his principal.<sup>2</sup>

§ 460. **Declarations of Assured.** — Declarations made by insured concerning his health after the policy has been issued on his life payable to a third party, as, for example, to his wife, are not competent in an action brought by such payee on the policy.<sup>3</sup> And so, in an action by the assignee or beneficiary of the policy, declarations and admissions of the assured made at a time prior to and remote from the application, and disconnected with any act or fact showing his condition of health, are incompetent for the purpose of contradicting the statements made in the application,<sup>4</sup> but, if it appear otherwise than by the declarations of assured, that such statements were untrue, then his prior declarations

<sup>1</sup> See *ante*, §§ 152–156 inc. and § 221.

<sup>2</sup> *Brink v. Merchants', etc., Ins. Co.*, 49 Vt. 442; *Dean v. Ætna L. Ins. Co.*, 62 N. Y., reversing 2 Hun, 358; *Covenant M. Ben. Assn. v. Conway*, 10 Bradw. 348; *Walker v. Farmers' Ins. Co.*, 51 Ia. 679; *Northwestern M. L. Ins. Co. v. Roth*, 87 Pa. St. 409; *Scott v. Home Ins. Co.*, 53 Wis. 238; *Zielke v. London Ass. Corp.*, 64 Wis. 442; *Phoenix Ins. Co. v. La Pointe*, 118 Ill. 384; *United Brethren M. A. Soc. v. McDermond*, 12 W. N. C. 73; *Mars v. Virginia Home Ins. Co.*, 17 S. C. 514; *Smith v. National L. Ins. Co.*, 103 Pa. St. 177.

<sup>3</sup> *McGinley v. United States Ins. Co.*, 8 Daly, 390; *Swartzbach v. Ohio Valley, etc., Union*, 25 W. Va. 622; *American Pop. L. Ins. Co. v. Day*, 39 N. J. L. 89; *Grangers' L. Ins. Co. v. Brown*, 57 Miss. 308; *Mobile L. Ins. Co. v. Morris*, 3 Lea, 101; *Valley Mut. L. Assn. v. Tee-walt*, 79 Va. 421; *John Hancock Mut. L. Ins. Co. v. Daly*, 65 Ind. 6; *McDermott v. Centennial M. L. Ass.*, 24 Mo. App. 73.

<sup>4</sup> *Edington v. M. L. Ins. Co.*, 67 N. Y. 185; 5 Hun, 1; *Singleton v. St. Louis M. L. Ins. Co.*, 66 Mo. 63; *Penn M. L. Ins. Co. v. Wiler*, 100 Ind. 92; *Union Central L. Ins. Co. v. Cheever*, 36 Ohio St. 201.

are admissible to show knowledge on his part of the falsity of such answers; <sup>1</sup> and statements made by the assured shortly prior to his application concerning his health, in connection with facts exhibiting his then state of health, are probably admissible upon the question of the truthfulness of the answers made by him in such application.<sup>2</sup> In an action by the beneficiary, upon a certificate issued to a member of a benefit society, neither an application of the member for reinstatement, nor statements made by him as to the cause of his suspension, are competent evidence to prove the fact of his suspension; <sup>3</sup> nor indeed are any admissions of his subsequent to his becoming a member competent against his beneficiary.<sup>4</sup> And if there has been no misrepresentation as to the health of assured, evidence as to what it was after the contract was consummated and of the disease of which he died, is immaterial.<sup>5</sup>

§ 461. Evidence of Physician as to Knowledge Acquired in Course of His Employment. — In most, if not all the States, statutes exist providing that physicians shall not be competent witnesses as to matters communicated to them, as such, by patients, in the course of their professional business, or as to advice given in such cases. These stat-

<sup>1</sup> Edington v. M. L. Ins. Co., *supra*.

<sup>2</sup> Swift v. Mass. M. L. Ins. Co., 63 N. Y. 186; Kelsey v. Universal L. Ins. Co., 35 Conn. 225; Aveson v. Kinnaird, 6 East, 188. But see Washington L. Ins. Co. v. Haney, 10 Kan. 525; Mulliner v. Guardian M. L. Ins. Co., 1 Thomp. & C. 448; Fraternal Mut. L. Ins. Co. v. Applegate, 7 Ohio St. 292.

<sup>3</sup> Lazensky v. Supreme Lodge K. of H., 31 Fed. Rep. 592; Dodge v. Freedman's Co., 93 U. S. 379.

\* Supreme Lodge K. of P. v. Schmidt, 98 Ind. 374, citing Fraternal M. L. Ins. Co. v. Applegate, 7 Ohio St. 292; Southern L. Ins. Co. v. Booker, 9 Heisk. 606; Washington L. Ins. Co. v. Haney, 10 Kan. 525; Bawls v. Am. Mut. L. Ins. Co., 27 N. Y. 282; Mulliner v. Guardian M. L. Ins. Co., 1 Thomp. & C. 448; Harley v. Heist, 86 Ind. 196; 44 Am. Rep. 285.

<sup>5</sup> Morrison v. Wisconsin Odd-fellows' M. L. Ins. Co., 59 Wis. 162.



utes have been liberally construed by the courts and it has been generally, and without known exception, held by them that in an action upon a life policy a physician may not testify to what he learned of the ailments of the insured, if he was his patient, either by examination, or observation, or oral communication.<sup>1</sup> Information obtained which was not necessary to enable the physician to do what was required, or before the assured became his patient, is not privileged.<sup>2</sup> These State statutes are binding on the Federal courts.<sup>3</sup> It is not a waiver of the privilege for the assured to give in his application the name and residence of his family physician;<sup>4</sup> nor is it a waiver of the right to object that the beneficiary has offered in evidence facts learned in a professional capacity by another physician;<sup>5</sup> nor does it alter the rule that the physician and the person he examined had never met previous to the examination, and no prescription or advice was given, and the examination was made at the physician's office and not paid for by the person examined.<sup>6</sup> But it has been held<sup>7</sup> that the provisions of the Missouri statute prohibiting a physician from testifying to any information he may have acquired from any patient, while visiting him professionally, may be waived by the patient, and, when waived by a clause in an application for life insurance, such waiver is binding on the beneficiary.

<sup>1</sup> *Masonic M. Ben. Assn. v. Beck*, 77 Ind. 203; *Excelsior M. A. Assn. v. Riddle*, 91 Ind. 84; *Gartside v. Conn. M. L. Ins. Co.*, 76 Mo. 446; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185; 5 Hun, 1; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256; 25 Am. Rep. 182; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 28 Hun, 430; *Grattan v. National L. Ins. Co.*, 15 Hun, 74. But see *Brown v. Metropolitan L. Ins. Co. (Mich.)*, 32 N. W. Rep. 610; 8 West. Rep. 775.

<sup>2</sup> *Edington v. Ætna L. Ins. Co.*, 77 N. Y. 564, reversing 13 Hun, 543.

<sup>3</sup> *Conn. Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250

<sup>4</sup> *Masonic M. Ben. Ass. v. Beck*, 77 Ind. 203.

<sup>5</sup> *Penn. M. L. Ins. Co. v. Wiler*, 100 Ind. 92.

<sup>6</sup> *Grattan v. Metropolitan L. Ins. Co.*, 24 Hun, 43.

<sup>7</sup> *Andreveno v. Mutual Reserve Fund L. Assn.*, 34 Fed. Rep. 870.

§ 462. **Opinion Evidence.** — Opinion evidence is admissible in actions on insurance policies, as in other cases and under the same conditions and limitations. Often, therefore, the testimony of persons versed in the business of insurance is allowed, and these experts can testify as to matters peculiarly within their knowledge, as, for example, that the business of a farmer is considered the least hazardous occupation;<sup>1</sup> but it does not follow that because one is an insurance agent that he is qualified to testify as an expert.<sup>2</sup> Sometimes non-experts are permitted to give opinions as, for instance, as to the insanity of a person if all the facts upon which it is based are stated;<sup>3</sup> but not unless the facts on which the opinion is based are stated;<sup>4</sup> but one not a physician cannot state his conclusion as to the cause of the death of a person from knowledge obtained by seeing him in his last illness,<sup>5</sup> nor can a witness testify as to the age of a person, he judging from the latter's appearance;<sup>6</sup> nor is the opinion of a witness admissible as to the effect upon a person of a habit of drunkenness five years before a policy was issued on his life, the witness knowing nothing concerning his habits in the meantime.<sup>7</sup> Physicians and surgeons of practice and experience are experts, and their opinions upon questions embraced in their profession and practice are admissible, though they have not made the particular disease in question a specialty.<sup>8</sup> A physician who attended the insured in his last illness may give his

<sup>1</sup> *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466.

<sup>2</sup> *Stennett v. Penn. F. Ins. Co.*, 68 Ia. 674.

<sup>3</sup> *Butler v. St. Louis L. Ins. Co.*, 45 Ia. 93; *United Brethren M. A. Soc. v. O'Hara (Pa.)*, 13 Atl. Rep. 932; 12 Cent. Rep. 682; *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

<sup>4</sup> *Southern L. Ins. Co. v. Wilkinson*, 53 Ga. 535.

<sup>5</sup> *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281.

<sup>6</sup> *Valley M. L. Assn. v. Teewalt*, 79 Va. 421.

<sup>7</sup> *Northwestern M. L. Ins. Co. v. Muskegon Bank*, 122 U. S. 501.

<sup>8</sup> *Hathaway v. National L. Ins. Co.*, 48 Vt. 335.

opinion as to the disease which caused his death;<sup>1</sup> or that death from the disease of which assured died is the result of other diseases of long standing and not of any sudden causes,<sup>2</sup> and as to the effect of a certain disease on the mind;<sup>3</sup> but such an expert cannot give his opinion on the testimony in a case,<sup>4</sup> nor his opinion as to the character of a risk on a man's life, if within three months he had had a hemorrhage of the stomach.<sup>5</sup> Opinions are not admissible if they are based on conjecture, as where a medical witness testified that he had an impression sufficient to satisfy his own mind, but not enough on which to base an opinion;<sup>6</sup> nor if the question does not call for facts and knowledge peculiarly within the knowledge of an expert, as whether, if the insured had a certain disease and committed suicide, it should be attributed to such disease;<sup>7</sup> nor can a medical witness state the meaning of the term, "family physician."<sup>8</sup> Opinions of officers of benefit societies as to the interpretation to be given to its laws are inadmissible, and<sup>9</sup> so is proof of the custom and usages of the society respecting the construction of the contract.<sup>10</sup> In an action upon a certificate in a mutual association, where the application of the member showed that he drank no liquor at all, and the validity of the certificate depended upon the truth or falsity of the representations in the application, the medical expert of the association issuing the certificate was asked several questions, to which objections were made and sustained, whether

<sup>1</sup> *Mobile L. Ins. Co. v. Walker*, 58 Ala. 290.

<sup>2</sup> *Edington v. Mut. L. Ins. Co.*, 77 N. Y. 564.

<sup>3</sup> *Koenig v. Globe M. L. Ins. Co.*, 10 Hun, 558.

<sup>4</sup> *Butler v. St. Louis L. Ins. Co.*, 45 Ia. 93; *Hagadorn v. Conn. M. L. Ins. Co.*, 22 Hun, 249.

<sup>5</sup> *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622.

<sup>6</sup> *Higbie v. Guardian M. L. Ins. Co.*, 53 N. Y. 603.

<sup>7</sup> *Van Zandt v. Mut. Ben. L. Ins. Co.*, 55 N. Y. 169.

<sup>8</sup> *Reid v. Piedmont & Arlington L. Ins. Co.*, 58 Mo. 421.

<sup>9</sup> *Davidson v. Supreme Lodge K. of P.*, 22 Mo. App. 263.

<sup>10</sup> *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509.

the application for membership would have been favorably passed on, if it had been stated in such application that the applicant drank liquor. The court, in passing upon these objections, said:<sup>1</sup> "We think that the objections to these questions were properly sustained. The real issue was, whether the statements, made in the application, were true or false. What would have been the effect, if some different statement from that, therein contained, had been made to the association, was of no consequence. The witness might give his opinion on a matter of science, connected with his profession, but he could not be allowed to state his views of the manner in which others would probably be influenced, if certain specified facts existed." Testimony, called for by questions of a similar character, has been generally held inadmissible.<sup>2</sup> There is, however, some authority tending to the contrary.<sup>3</sup> A medical examiner may testify as to the effect on his mind and action of certain answers of the applicant.<sup>4</sup>

**§ 463. Offering Application in Evidence as Part of Contract.** — On principle, if by the terms of the policy the application is made a part thereof, both should be offered in evidence together, and it is error to admit the policy without the application if objection is made,<sup>5</sup> but the error

<sup>1</sup> *Northwestern B. & M. A. Assn. v. Hall*, 118 Ill. 169.

<sup>2</sup> *Co-operative L. Assn. v. Leflore*, 53 Miss. 1; *Mutual Ben. L. Ins. Co. v. Wise*, 34 Md. 583; *Washington L. Ins. Co. v. Haney*, 10 Kan. 525; *Rawls v. Am. Mut. L. Ins. Co.*, 27 N. Y. 282; 36 Barb. 357; *Durrell v. Bederly*, 1 Holt N. P. 283; *Lyman v. State M. F. Ins. Co.*, 14 Allen, 329; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Campbell v. Rickards*, 5 Barn. & A. 480.

<sup>3</sup> The following are cited in *Co-operative L. Assn. v. Leflore*, 53 Miss. 1, but they do not support fully the claim there made: *Berthou v. Loughman*, 2 Stark. N. P. 258; *Webber v. Eastern R. R.*, 2 Met. 147; *Kern v. South St. L. M. Ins. Co.*, 40 Mo. 19; *Hawes v. New England Ins. Co.*, 2 Curtis C. C. 229; *Hartman v. Keystoue Ins. Co.*, 21 Pa. St. 466.

<sup>4</sup> *Valton v. Loan Fund Ass. Soc.*, 1 Keyes, 21.

<sup>5</sup> *American Underwriters' Ass. v. George*, 97 Pa. St. 238; *Lycoming*

is cured if afterwards the company offer the application;<sup>1</sup> or, as the application is one which belongs to and is in the possession of the company, if the latter on notice refuses to produce it, the policy is admissible without the application;<sup>2</sup> and it is also admissible without the application if the latter is only referred to in the policy but not made a part thereof;<sup>3</sup> or when the insured swears he never signed the application.<sup>4</sup>

§ 464. **Evidence of Preliminary Negotiations or Agreements.** — The law will not allow the terms of a written contract to be varied by parol evidence of what was said at the time it was negotiated. Written contracts must speak for themselves; and the language used cannot be varied or controlled by parol evidence of what was said by the parties or their agents at the time the contract was negotiated. A written contract may sometimes be discharged, or one or more of its provisions waived, by a parol agreement subsequently made; but never by what was said previous to or at the time it was made, except in a direct proceeding in equity to reform, rescind, or compel the specific performance of it. Never in an action at law. This rule is applicable to insurance policies as well as all other written contracts.<sup>5</sup> The assured cannot, therefore, be allowed to

*F. Ins. Co. v. Storrs*, *Id.* 361. See *contra*, *Cushman v. United States L. Ins. Co.*, 4 Hun, 783; *Roach v. Ky. Mut. Security F. Co. (S. C.)*, 6 S. E. Rep. 286.

<sup>1</sup> *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108; *Edington v. Mut. L. Ins. Co.*, 67 N. Y. 185; *Rich v. Rich*, 16 Wend. 666.

<sup>2</sup> *American Underwriters' Ass. v. George*, *supra*.

<sup>3</sup> *Edington v. Mut. L. Ins. Co.*, *supra*.

<sup>4</sup> *Commercial Union Ass. Co. v. Elliott*, 13 Atl. Rep. 970; 12 Cent. Rep. 668.

<sup>5</sup> *Combs v. Charter Oak L. Ins. Co.*, 65 Me. 382; *Jennings v. Quincy M. F. Ins. Co.*, 7 Gray. 370; *Tebbetts v. Hamilton Mut. Ins. Co.*, 3 Allen, 569; *Ashworth v. Builders M. F. Ins. Co.*, 112 Mass. 422; *Bryan v. World M. L. Ins. Co.*, 41 Conn. 168; *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392; *Sullivan v. Cot-*

show that before the policy was executed the agent agreed to extend the time of payment of the premium;<sup>1</sup> or to vary any of the stipulations, admissions or receipts in the policy;<sup>2</sup> or as to any verbal understanding with the agent;<sup>3</sup> or that a policy payable on a day designated therein was payable on a different day;<sup>4</sup> or, if the language of the policy is clear, as to the construction the parties have placed upon it;<sup>5</sup> or as to the intention of the parties that another than the one named in the policy should be the beneficiary;<sup>6</sup> unless there is a latent ambiguity in the designation.<sup>7</sup>

§ 465. **When Parol Evidence Admissible.** — Parol evidence is admissible to explain receipts given for premiums;<sup>8</sup> and to show in what sense special words, as “spitting of blood,” were used in an application for life insurance;<sup>9</sup> and to show fraudulent representations as to a local board,<sup>10</sup> or that because of the fraud of one of the parties to the contract it . . .

ton States L. Ins. Co., 43 Ga. 423; *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 187.

<sup>1</sup> *Coombs v. Charter Oak L. Ins. Co.*, *supra*; *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487; *Clevenger v. Mut. L. Ins. Co.*, 2 Dak. 114; *Mitchell v. Universal L. Ins. Co.*, 54 Ga. 289.

<sup>2</sup> *Trager v. Louisiana Eq. L. Ins. Co.*, 31 La. Ann. 235; *Shaw v. Republic L. Ins. Co.*, 69 N. Y. 286.

<sup>3</sup> *Carlin v. Western Ass. Co.*, 57 Md. 515.

<sup>4</sup> *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151.

<sup>5</sup> *Michael v. St. Louis M. F. Ins. Co.*, 17 Mo App. 23; *Nashville L. Ins. Co. v. Mathews*, 8 Lea, 499.

<sup>6</sup> *Baldwin v. State Ins. Co.*, 60 Ia. 497; *Russell v. Russell*, 64 Ala. 500; *Elliott v. Whedbee*, 94 N. C. 115.

<sup>7</sup> *Pace v. Pace*, 19 Fla. 438; *Richardson v. Home Ins. Co.*, 15 Jones & Sp. 128; *Same v. Firemen's Ins. Co.*, *Id.* 159. See *Daniels v. Citizens' Ins. Co.*, 10 Biss. 116; 5 Fed. Rep. 425.

<sup>8</sup> *Texas M. L. Ins. Co. v. Davidge*, 51 Tex. 244; *Scurry v. Cotton, States L. Ins. Co.*, 51 Ga. 624; *Todd v. Piedmont, etc., L. Ins. Co.*, 34 La. Ann. 63; *McLean v. Piedmont, etc., Ins. Co.*, 29 Gratt. 361; 31 *Id.* 517.

<sup>9</sup> *Singleton v. St. Louis Mut. L. Ins. Co.*, 66 Mo. 63.

<sup>10</sup> *Penn. Mut. L. Ins. Co. v. Crane*, 134 Mass. 56.

does not express the actual agreement,<sup>1</sup> or a mistake.<sup>2</sup> When the contract is to pay as many dollars as there are members of the association, the number of members may be shown by parol in order to arrive at the measure of damages;<sup>3</sup> or it may be shown by statements contained in an assessment notice;<sup>4</sup> or by the number of certificates issued,<sup>5</sup> or under a peculiar wording of the certificate, where it was agreed to pay a certain sum and not to exceed seventy-five per cent of the assessments collected, the beneficiary may recover without proving demand on the company to make assessments, or show that assessments have been made; or if made, the amount collected thereon.<sup>6</sup>

§ 466. **Canvassing Documents, Prospectuses, Rules, etc.** — Published documents and rules of an insurance company in respect to the transaction of its business are admissible on the part of a policy holder in an action against it, although it is not shown that he was aware of their existence where the cause of action arose.<sup>7</sup> And the better rule is that a prospectus of an insurance company may be given in evidence to modify the terms of the policy regarding payment of premium.<sup>8</sup>

<sup>1</sup> *Hopkins v. Hawkeye Ins. Co.*, 57 Ia. 203.

<sup>2</sup> *Ætna L. Ins. Co. v. Brodie*, 5 Can. Sup. Ct. 1; 20 L. Can. Jur. 286. See *ante*, § 458.

<sup>3</sup> *St. Clair Co. Ben. Soc. v. Fietsam*, 97 Ill. 474; *Fairchild v. N. Eastern M. L. Ass.*, 51 Vt. 628.

<sup>4</sup> *Fairchild v. N. Eastern M. L. Ass.*, *supra*.

<sup>5</sup> *Neskern v. N. W. Endowment, etc., Ass.*, 30 Minn. 406.

<sup>6</sup> *Kansas Protec. Union v. White*, 36 Kan. 760; 14 Pac. Rep. 275. See *ante*, § 458.

<sup>7</sup> *Walsh v. Ætna L. Ins. Co.*, 30 Ia. 133. But see *Clemmitt v. N. Y. L. Ins. Co.*, 76 Va. 355.

<sup>8</sup> *Wood v. Dwarries*, 11 Exch. 493; 25 L. J. Ex. 129; *Wheulton v. Hardisty*, 8 El. & Bl. 232; 27 L. J. Q. B. 241; 92 E. C. L. R. 231; *Collett v. Morrison*, 9 Hare, 163; *Ruse v. Mut. L. Ins. Co.*, 24 N. Y. 653; doubting *s. c.* 23 N. Y. 516. See *ante*, § 363; See as to circulars of the company being inadmissible. *Continental Ins. Co. v. Hamilton*, 41 Ohio St. 274; *Clemmitt v. New York L. Ins. Co.*, 76 Va. 355.

§ 467. **Evidence of Usage.**— Under some circumstances evidence of usage is admissible, as for example the custom of receiving premiums after they were due,<sup>1</sup> but usage must be proved by instances not opinions;<sup>2</sup> and a custom is not proved by the testimony of a witness that in certain instances known to him a forfeiture was not insisted on. It must be shown that the custom was uniform.<sup>3</sup> A usage practiced by one company cannot be inferred to exist so as to bind another company;<sup>4</sup> nor, if the rights of parties depend upon the construction to be given a contract, can evidence of the custom and usage of the company and of the decisions of its officers respecting the construction be given.<sup>5</sup>

§ 468. **Construction of Insurance Policies.**— We have already referred to the general rules for the construction of insurance contracts.<sup>6</sup> The first is that they are to be construed favorably in favor of the assured and strongly against the insurer. As the Supreme Court of Vermont has said:<sup>7</sup> “It is a fundamental rule in the law of insurance, that the policy shall be construed most strongly against the insurer, and liberally in favor of the assured. The policy is written by the insurers. They use their own language, and surround and barricade their liability under it with such defenses as they choose to adopt. Oftentimes, their policies, instead of being simple, intelligible instruments that the average holder can understand and construe, are burdened with a great number of technical stipulations

<sup>1</sup> Girard L. Ins. Co. v. Mut. L. Ins. Co., 97 Pa. St. 15. But see *Franklin L. Ins. Co. v. Sefton*, 53 Ind. 320; and *ante*, §§ 361, 431, 432.

<sup>2</sup> *Hennessy v. New York M. M. Ins. Co.*, 1 Old (Nov. Sc.), 259.

<sup>3</sup> *Illinois Masons' Ben. Soc. v. Baldwin*, 86 Ill. 479.

<sup>4</sup> *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *American Ins. Co. v. Neiberger*, 74 Mo. 167.

<sup>5</sup> *Manson v. Grand Lodge, A. O. U. W.*, 30 Minn. 509.

<sup>6</sup> See *ante*, §§ 177, 203, 224.

<sup>7</sup> *Brink v. Merchants', etc., Ins. Co.*, 49 Vt. 457.



and conditions, buried under ingenious phraseology that reflects great credit upon the draughtsman, but leaves 'plain people' to learn its true import after their property is destroyed. Then they are informed that the policy is a mere technical notice of special matter to be given in evidence in answer to their claim for damages. There is obvious reason for the rule of liberal construction in favor of the man whose legal rights are to be extracted from such a labyrinth of mysticism." All the decisions of the courts in insurance cases, cited in the preceding pages, illustrate the universal application of this doctrine. The general rules for the construction of written contracts of course also apply.

§ 469. **Burden of Proof.** — In an action upon a life insurance policy, although the answers in the application are warranties, the burden of proof is on the defendant to show the falsity of any such answers in accordance with the general rule that the law does not require a party to prove a negative. As was said by the Supreme Court of the United States: <sup>1</sup> "The number of questions now asked of the assured in every application for a policy, and the variety of subjects, and length of time which they cover, are such, that it may be safely said that no sane man would ever take a policy if proof to the satisfaction of a jury of the truth of every answer were made known to him to be an indispensable prerequisite to payment of the sum secured, that proof to be made only after he was dead and could render no assistance in furnishing it. On the other hand, it is no hardship, that, if the insurer knows or believes any of these statements to be false, he shall furnish the evidence on which that knowledge or belief rests. He can thus single out the answer whose truth he proposes to contest, and, if he has any reasonable grounds to make such an issue, he

<sup>1</sup> *Piedmont L. Ins. Co. v. Ewing*, 92 U. S. 377.

can show the facts on which it is founded.”<sup>1</sup> The burden of establishing the failure to pay assessments is upon the defendant.<sup>2</sup> Where insurable interest is denied the burden of proof is on the plaintiff to prove it;<sup>3</sup> and the beneficiary of a member of a benevolent society has the burden of proof to show that the member was in good standing at the time of his death, the allegation of the petition to that effect being denied by the answer.<sup>4</sup> The parties who claim under the assignment of a benefit certificate, in its inception payable to a party designated by name, must show that the transfer was in accordance with the laws of the society issuing it,<sup>5</sup> and where a policy is payable to a number of persons, the burden of proving that any one of them survived the others is upon him who asserts it.<sup>6</sup>

§ 470. Evidence of Death. — In an action on a policy of life insurance the burden is on the plaintiff to prove the

<sup>1</sup> Insurance Co. v. Gridley, 100 U. S. 614; John Hancock M. L. Ins. Co. v. Daly, 65 Ind. 6; Northwestern M. L. Ins. Co. v. Hazelett, 105 Ind. 212; 4 N. East. Rep. 582; 2 West. Rep. 690; National Ben. Assn. v. Grauman, 107 Ind. 288; 5 West. Rep. 848; 7 N. East. Rep. 233; Granger's L. Ins. Co. v. Brown, 57 Miss. 308; Roach v. Ky. Mut. Security F. Co. (S. C.), 6 S. E. Rep. 286; Boisblanc v. La. Equitable L. Ins. Co., 34 La. Ann. 1167; Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79; Van Valkenburgh v. Am. Pop. L. Ins. Co., 70 N. Y. 605; Murray v. N. Y. L. Ins. Co., 85 N. Y. 236; Mobile L. Ins. Co. v. Morris, 3 Lea, 101; Southern L. Ins. Co. v. Booker, 9 Heisk. 606; Redman v. Aetna Ins. Co., 49 Wis. 431; Grange Mill Co. v. Western Ass. Co., 118 Ill. 396; Swick v. Home L. Ins. Co., 2 Dill. 160; Holloman v. L. Ins. Co., 1 Woods, 674; Clark v. Hamilton M. Ins. Co., 9 Gray, 148; Trenton M. L. Ins. Co. v. Johnson, 24 N. J. L. 576; Mut. Ben. L. Ins. Co. v. Wise, 34 Md. 582; N. Y. L. Ins. Co. v. Graham, 2 Duv. 506; Price v. Phoenix L. Ins. Co., 17 Minn. 497.

<sup>2</sup> Tobin v. West. M. A. Soc., 72 Ia. 261; 33 N. W. Rep. 663.

<sup>3</sup> Hooper v. Robinson, 98 U. S. 528; Singleton v. St. Louis Mut. L. Ins. Co., 66 Mo. 63.

<sup>4</sup> Siebert v. Supreme Council, etc., 23 Mo. App. 268. But see Tobin v. Western M. A. Soc., etc., *supra*.

<sup>5</sup> Henry v. Trustees Grand Lodge, etc., 15 Bradw. 151.

<sup>6</sup> Fuller v. Linzee, 135 Mass. 468.

death of the person whose life is insured.<sup>1</sup> The general rule is that letters of administration are *prima facie* evidence of the death of the person on whose estate they are granted, but the presumption of death raised thereby is weak and inconclusive, and may be rebutted by slight evidence.<sup>2</sup> But the Supreme Court of the United States, in accordance with the English doctrine, disapproves of this doctrine and has held to the contrary.<sup>3</sup> Death, like other facts, may be established by circumstantial evidence, when direct evidence is not attainable; and when absence without tidings concurs with other attendant and supporting circumstances to produce the conviction that the party is dead, such proof is all that can be required.<sup>4</sup> And it is said that the disappearance of a man "under circumstances of shipwreck, or earthquake, or battle, or explosion, or like perils, might well produce a conviction that he is dead."<sup>5</sup> The Supreme Court of Michigan also has said that: "There is no doctrine which in civil cases requires death to be proved by any more conclusive or peculiar evidence than any other fact material to recovery in an action. If the testimony satisfies the court or jury passing on the facts, and is reasonably sufficient, and compels belief, the conclusion is certainly lawful. \* \* \* A sudden disappearance, and the failure to discover any traces of a man who if living, could not easily have gone unnoticed, and who was in such a physical and mental condition, as to excite the

<sup>1</sup> National Ben. Assn. v. Grauman, 107 Ind. 288; 7 N. East. Rep. 233; 5 West. Rep. 848; Wackerle v. Mutual Life Ins. Co., 14 Fed. Rep. 23; 4 McC. 508.

<sup>2</sup> Tisdale v. Conn. Mut. L. Ins. Co., 26 Ia. 170; Lancaster v. Washington L. Ins. Co., 62 Mo. 121; Cunningham v. Smith, 70 Pa. St. 450; Newman v. Jenkins, 10 Pick. 515; Jaffers v. Radcliff, 10 N. H. 242; McKimm v. Biddle, 2 Dall. 100; Munro v. Merchant, 26 Barb. 397.

<sup>3</sup> Mutual Ben. L. Ins. Co. v. Tisdale, 91 U. S. 241; Moons v. De Bernales, 1 Russ. 307; Clayton v. Gresham, 10 Ves. 288; Leach v. Leach, 8 Jur. 211.

<sup>4</sup> Boyd v. New England M. L. Ins. Co., 34 La. Ann. 848.

<sup>5</sup> *Idem*; see cases cited just below.

anxiety of his friends upon this very subject, cannot be said to afford no evidence tending to prove his death.”<sup>1</sup> The cases above cited show that a presumption of the death of a person may arise from circumstances of disappearance and being brought in contact with specific perils, although seven years have not elapsed. The usual presumption of death from absence of seven years without tidings also prevails in life insurance cases, but slight evidence has been held to rebut the presumption.<sup>2</sup> The Supreme Court of Missouri has held that in cases where death is presumed from an absence of seven years without tidings, there is no presumption of death at any particular time during these seven years;<sup>3</sup> but it has also been said in the same State that, no facts appearing except that of the absence of a person for seven years without being heard from, it will be presumed that he died on the last day of the seven years.<sup>4</sup>

§ 471. **Proofs of Loss as Evidence.** — The preponderance of authority is in favor of the view that proofs of loss are admissible in evidence for the sole purpose of showing that the requirements of the policy concerning them have been complied with.<sup>5</sup> But, although this is true, the Supreme Court of the United States has said that preliminary

<sup>1</sup> *John Hancock M. L. Ins. Co. v. Moore*, 34 Mich. 41; *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Sensenderfer v. Pacific M. L. Ins. Co.*, 19 Fed. Rep. 68; *Whiteley v. Equitable L. A. Soc. (Ia.)*, 39 N. W. Rep. 369.

<sup>2</sup> *Prudential Assurance Co. v. Edmonds*, L. R. 2 App. Cas. 487.

<sup>3</sup> *Lancaster v. Washington L. Ins. Co.*, 62 Mo. 121; *Hancock v. American L. Ins. Co.*, *Id.* 26.

<sup>4</sup> *Kauz v. Great Council, etc.*, 13 Mo. App. 341.

<sup>5</sup> *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302; *Breckinridge v. American Central F. Ins. Co.*, 87 Mo. 62; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Imperial F. Ins. Co. v. Shrimmer*, 96 *Id.* 580; *Commonwealth Ins. Co. v. Sennett*, 41 Pa. St. 161; *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 402; *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188; 44 *Id.* 269; *Baile v. Ins. Co.*, 73 Mo. 371; *Newmark v. Liverpool, etc., Ins. Co.*, 30 Mo. 160. But see *Moore v. Protection Ins. Co.*, 29 Me. 97; *Howard v. City F. Ins. Co.*, 4 Denio, 502; *Lawrence v. Mut. L. Ins. Co.*, 5 Bradw. 280; *Covenant M. B. Ass. v. Hoffman*, 110 Ill. 603.

proofs, presented in compliance with a condition of the policy, are admissible as *prima facie* evidence of the facts stated therein against insurer and on behalf of insurer.<sup>1</sup> These last mentioned cases and others hold that the statements made by the assured in the proofs of loss are admissions, and may be considered by the jury for what they are worth,<sup>2</sup> and the modern rule is probably that the proofs of loss furnished by the assured are not only evidence that the condition of the policy requiring them has been complied with, but are also to be regarded as admissions of the fact therein stated. But the party furnishing them may show that statements in the proofs of loss were erroneous or inadvertently made, and the mistake can be shown by parol.<sup>3</sup> In Massachusetts it is held that if the insured wishes to contradict the proofs of loss he must serve amended proofs on the insurer,<sup>4</sup> but this doctrine is somewhat qualified in a later case.<sup>5</sup> Statements made by the physician attending the insured, contained in the proofs of

<sup>1</sup> *Mut. Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380; *Mut. L. Ins. Co. v. Newton*, 22 Wall. 32.

<sup>2</sup> *Keels v. Mut. Reserve F. Life Assn.*, 29 Fed. Rep. 198; *McMaster v. Insurance Co.*, 55 N. Y. 228; *Parmelee v. Ins. Co.*, 54 N. Y. 193. But see *Campbell v. Charter Oak Ins. Co.*, 10 Allen, 218; *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507; *Worsley v. Wood*, 6 T. R. 710.

<sup>3</sup> *Conn. Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593; *Behr v. Conn. M. L. Ins. Co.*, 2 Flip. 692; 4 Fed. Rep. 357; *Neill v. Am. Popular L. Ins. Co.*, 10 Jones & Sp. 259; *Pittsburg Ins. Co. v. Frazee*, 107 Pa. St. 521; *Cotton States L. Ins. Co. v. Edwards*, 74 Ga. 220; *Castner v. Farmers' M. F. Ins. Co.*, 50 Mich. 273; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531; *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260; *Smiley v. Citizens' F. & L. Ins. Co.*, 14 W. Va. 33; *Waldeck v. Springfield F. & M. Ins. Co.*, 56 Wis. 96; *New Orleans Ins. Co. v. O'Brian*, 8 Ky. L. Rep. 785; *Day v. Mut. Ben. L. Ins. Co.*, 1 McA. 598; *Hoffman v. Aetna Ins. Co.*, 1 Rob. 501; 32 N. Y. 405; *Parmelee v. Hoffman F. Ins. Co.*, 54 N. Y. 193; *Hayes v. Union Mut. L. Ass. Co.*, 44 Up. Can. Q. B. 360; *McMaster v. Ins. Co.*, 55 N. Y. 222; *Aetna Ins. Co. v. Stevens*, 48 Ill. 31; *Conn. Mut. L. Ins. Co. v. Siegel*, 9 Bush, 450; *Germania F. Ins. Co. v. Curran*, 8 Kan. 9.

<sup>4</sup> *Campbell v. Ins. Co.*, 10 Allen, 213. See also *Cook v. Lion F. Ins. Co.*, 67 Cal. 368.

<sup>5</sup> *City Five Cents, etc., Bank v. Pennsylvania F. Ins. Co.*, 122 Mass. 165.

death, are probably privileged and inadmissible to show that false answers were made in the application. By including such statements in the proofs the assured did not consent that they might be used against her.<sup>1</sup> Such statements are wholly inadmissible if based on hearsay,<sup>2</sup> and it has been held that a certificate of a physician included in the proofs of loss is not evidence of the fact it states, but is a suggestion entitled to weight in considering insurer's conduct in resisting payment.<sup>3</sup>

§ 472. **Foreign Insurance Companies may Remove Causes to Federal Courts.** — Foreign insurance companies may remove cases from the State to the Federal courts under the acts of Congress in the same way as natural persons.<sup>4</sup> An agreement to abstain, in all cases, from resorting to the courts of the United States is void as against public policy, and a State statute, which requires such an agreement as a condition for being allowed to do business in such State, is in conflict with the constitution of the United States,<sup>5</sup> but a State has the right to impose conditions, not in conflict with the constitution or the laws of the United States, to the transaction of business within its territory by an insurance company, chartered by another State, or to exclude such company altogether, or, having given a license to revoke it, with or without cause. If a company, in violation of its agreement not to resort to the United States courts, does remove causes there, the State may revoke its license, and its motives or means of enforcement of its wishes are not the subject of judicial inquiry.<sup>6</sup>

<sup>1</sup> *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670.

<sup>2</sup> *Insurance Co. v. Schmidt*, 40 Ohio St. 112.

<sup>3</sup> *Davey v. Aetna L. Ins. Co.*, 20 Fed. Rep. 482. See also *Cushman v. United States L. Ins. Co.*, 70 N. Y. 72.

<sup>4</sup> *Insurance Company v. Morse*, 20 Wall. 445.

<sup>5</sup> *Insurance Co. v. Morse*, *supra*.

<sup>6</sup> *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *State v. Doyle*, 40 Wis. 175; *Tennessee, etc., v. Davis*, 100 U. S. 257.

§ 473. **Retaliatory Legislation.** — Many States have in their insurance laws, prescribing the terms upon which foreign corporations are allowed to do business within their limits, a retaliatory provision; that is, they declare that if any other State shall impose other or greater taxes, fees, licenses, deposits, etc., upon insurance companies or their agents, than those imposed by the laws of the State in question, then such taxes, fees, licenses, etc., shall be imposed upon the insurance companies of such other State or the agents of such companies. There seems to be some question whether such retaliatory features are not unconstitutional, because in violation of the principle that all taxation must be uniform,<sup>1</sup> although they have been sustained in at least one case.<sup>2</sup> We may, however, well leave the discussion of this question to works on taxation or constitutional law.

§ 474. **Insurance Companies Subject to Insolvency and Bankruptcy Laws Like Other Corporations.** — Like other corporations, insurance companies are subject to the insolvency, assignment and bankruptcy laws of the State of their domicile, unless specially exempted by statute. If not thus excepted, no distinctions should, on principle, be made between insurance organizations and those for other purposes;<sup>3</sup> and a mutual life insurance company has been held to be “a business corporation” within the meaning of the bankrupt act.<sup>4</sup>

§ 475. **Winding up by Insurance Commissioner: Special Deposit with State: Insolvency of Mutual Company: Effect of Charter Provisions.** — In most, if not all, States

<sup>1</sup> *Clark v. Mobile*, 67 Ala. 217.

<sup>2</sup> *State v. Insurance Co. of N. A. (Ind.)*, 15 West. Rep. 93; 17 N. East. Rep. 574; and see *Doyle v. Continental Ins. Co.*, 94 U. S. Rep. 535, *supra*.

<sup>3</sup> *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258; *Reed v. Independent Ins. Co.*, 1 Ins. L. J. 735.

<sup>4</sup> *In re Hercules M. L. Ass. Soc.*, 1 Ins. L. J. 875.

of the Union the business of insurance is regulated by statute, and is under the supervision of an officer generally known as the insurance commissioner. These laws in nearly all cases provide for certain proceedings to be taken upon the insolvency of the companies and the manner of disposition of the special fund deposited with the department for domestic policy holders. These insurance statutes are similar in many respects and, in New York especially, have been construed in whole or in part by the courts. It is not thought necessary to examine these statutes or to refer to all of the decisions respecting them. In Ohio it has been said by the Supreme Court of that State that the deposit made by the company with the department of insurance is for the benefit of the policy holders only, and not for the security of the general creditors of the company, and should be applied *pro rata* on the claims of such policy holders, and that general creditors have no claim upon it. In event of insolvency, after the policy holders are paid in full, then the remaining securities are liable to the rights of the company generally.<sup>1</sup> In Mississippi it has been held that the fund deposited with the State by a foreign insurance company is intended as a security to protect policies issued to citizens of that State, by agents appointed in the mode prescribed by the statute, and doing business in that State. And if a citizen of that State take out a policy in such company from an agent residing and doing business out of the State he has no claim upon the deposit in the treasury of the State, but is to be regarded as having elected to look rather to the general assets of the company than to such special fund.<sup>2</sup> All policy holders of a mutual life insurance company, whether residents of the company's domicile or not, are presumed to know the terms of its charter, and the laws regulating its

<sup>1</sup> *Falkenbach v. Patterson*, 43 Ohio St. 359.

<sup>2</sup> *Piedmont & Arlington Life Ins. Co. v. Wallin*, 58 Miss. 1.



existence, and are bound thereby, and in the absence of special provisions in the laws of the State, other than such domicile, where it may have property, attaching policy holders can claim no lien on such property, though residents of the State where such property is situated; but, if the laws of the domicile of the company provide for the winding up of the company, the sequestration of its property, the allowance of the claims of policy holders and an equitable distribution of the fund, such attaching creditors must be remitted to their share of the equitable distribution under the proceedings previously commenced in the State of the domicile of the company.<sup>1</sup> The claims for death losses stand on no different basis than those of living policy holders, the same principle governs both.<sup>2</sup>

**§ 476. Attachments of Company's Property by Policy Holders.** — The general property of a life insurance company in States other than that of its domicile is probably liable to attachment by policy holders of the State where such property is situated, if the company is not a mutual one, and possibly even if it is mutual, unless the charter or laws of the domicile of the corporation provide for winding it up if insolvent.<sup>3</sup> In a case in Virginia where certain creditors, policy holders, attached the property of the company, and brought bills to enforce their liens, it was held,<sup>4</sup> that the attachments did not enure to the benefit of all the policy holders, whether parties to the suits or not, but, the company being insolvent at the time of attachment, the complainants were entitled to recover, and no subsequent

<sup>1</sup> *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 197; *Relf v. Rundle*, 103 U. S. 222; *Rundle v. Life Association*, 10 Fed. Rep. 720; 4 Woods, 94; *Davis v. Life Assn.*, 11 Fed. Rep. 780; *Taylor v. Life Assn.*, 13 Fed. Rep. 493; 3 Fed. Rep. 465.

<sup>2</sup> *Weingartner v. Charter Oak L. Ins. Co.*, 32 Fed. Rep. 314.

<sup>3</sup> See last section.

<sup>4</sup> *Universal L. Ins. Co. v. Binford*, 76 Va. 103.

condition in the affairs of the company effected by other policy holders could defeat their recovery. Further, that each policy holder was entitled to a sum of money, which, on the day of the company's insolvency, would purchase from a solvent company a policy of the same kind, for the same amount and the same rate of premium. This sum is to be ascertained by treating the difference between the premiums paid the company and the premiums to be paid the new company as an annuity for the assured's expectation of life and calculating the cash value.<sup>1</sup> Attachments have also been sustained in other States.<sup>2</sup>

§ 477. **Receivers of Insurance Companies.** — A decree of a court of competent jurisdiction dissolving a corporation and appointing a receiver vests in the latter all the property of the corporation, and such appointment cannot be questioned collaterally. The receiver represents both the corporation and creditors and stockholders, and in his character as trustee he may maintain an action to set aside illegal or fraudulent transfers of the property made by its officers, and to recover the assets outstanding or misapplied.<sup>3</sup> His possession is that of the court, whose officer he is, and he cannot be sued at law without its consent.<sup>4</sup> He has no power to waive proofs of loss or any legal defense.<sup>5</sup> He can sue in a foreign jurisdiction to recover assets,<sup>6</sup> but has no other or greater rights as against its policy holders, than

<sup>1</sup> *In re Albert Life Assn.*, 9 L. R. Eq. 708; 39 L. J. Ch. 539; 22 L. T. 697; 18 W. R. 1097.

<sup>2</sup> *Life Assn. v. Fassett*, 102 Ill. 315; *City Ins. Co. v. Commercial Bank*, etc., 68 Ill. 348.

<sup>3</sup> *Attorney-General v. Guardian M. L. Ins. Co.*, 77 N. Y. 272.

<sup>4</sup> *Spinning v. Ohio L., etc., Co.*, 2 Dis. S. C. Cin. 336.

<sup>5</sup> *Evans v. Tri-Mountain Ins. Co.*, 9 Allen, 329; *McEvers v. Lawrence*, Hoff. Ch. 172.

<sup>6</sup> *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Ellis v. Boston*, etc., R. R. Co., 107 Mass. 1; *Wilmer v. Atlantic*, etc., Co., 2 Woods, 418; *Bagby v. Atlantic*, etc., R. R. Co., 86 Pa. St. 291; *Hurd v. City of Elizabeth*, 41 N. J. L. 1.

the company.<sup>1</sup> Receivers of insurance companies generally are governed by the same rules which apply in the case of those of other corporations, and further information concerning them must be sought in the special treatises relating to that subject. When a receiver is appointed for a life insurance company and its business arrested, the value of all claims against it are to be computed from the time of the halt so called.<sup>2</sup> If a policy holder die after the receivership, but before the time of presentment of claims has expired, his claim is to be considered as matured and its full amount, and not the reserve, is the basis for allowance ;<sup>3</sup> and it seems that if, after the time for allowance of demands has expired, a policy holder should die, it is discretionary with the court whether or not the allowance should be reopened.<sup>4</sup>

§ 478. **Insolvent Life Insurance Companies : Status of Policy Holders.** — When a life insurance company becomes insolvent and is placed in the custody of a receiver, its policy holders are not to be considered partners, but creditors, to whom it is liable for breach of the contract implied in its policies that it will receive premiums subsequently accruing, so as to keep the policy holder constantly insured, and so as to keep on hand the reserve required by law and maintain its engagements. The damage of the policy holder is the value of the policy destroyed, and, to ascertain this, resort may properly be had to tables used in the business of life insurance showing the average expectancy of life. All policy holders are to be treated alike, although the health of some may have become so impaired that no reinsurance can be effected. Unmatured paid up policies have no preference and annui-

<sup>1</sup> *Savage v. Medbury*, 19 N. Y. 32; *Lycoming F. Ins. Co. v. Langley*, *supra*.

<sup>2</sup> *Attorney-General v. North Am. L. Ins. Co.*, 62 N. Y. 172.

<sup>3</sup> *People v. Security L. Ins. Co.*, 78 N. Y. 114.

<sup>4</sup> *Attorney-General v. Continental L. Ins. Co.*, 88 N. Y. 77 But see *Dean's Appeal*, 98 Pa. St. 101.

ties are to have their present value computed according to the tables in ordinary use. Death claims, also, are not preferred, but if a policy holder die after the insolvency and receivership, but before the time of presentment of proofs, the damage is the full amount of the policy, less a proper deduction for interest. In all claims the premium notes are to be deducted from the amount of damages.<sup>1</sup> In mutual companies, however, claims founded on policies matured before the receivership, are to be preferred to claims on policies not matured, for, the maturity of the policy changes the *status* of the policy holder. He stands to the company in the same place that a creditor stands to the firm; he is to be preferred to members of the firm.<sup>2</sup>

§ 479. **Insolvent Benefit Societies.** — When a corporation, in the nature of a benefit society, ceases to do business because of some impediment, as for example being refused a license by the State in which it was incorporated, it cannot organize a new company and, against the will of the old members, use its endowment fund to obtain reinsurance of the old members, but on application of such old members or parties insured, a court of equity will wind up the affairs of the old company and compel the distribution of such fund among those for whose benefit it was created. In such a case in Michigan<sup>3</sup> the Supreme Court of that State said: “My opinion is that no assessments could legally be made by the board of trustees for the purpose of paying losses which occurred after license to do business was refused. The inhibition of the statute extended to the exercise of corporate functions in Michigan. Its proceedings as a corporation were ar-

<sup>1</sup> *People v. Security Life Ins. Co.*, 78 N. Y. 114

<sup>2</sup> *Vanatta v. N. J. Mut. Life Ins. Co.*, 31 N. J. Eq. 15; *Stamm v. Northwestern M. Ben. Assn. (Mich.)*, 32 N. W. Rep. 710; 8 West. Rep. 767.

<sup>3</sup> *Stamm v. N. Western Mut. Ben. Assn.*, 32 N. W. Rep. 710; 8 West. Rep. 767.

rested, and, as no steps were taken by it to obtain the right to do business any longer, but on the contrary it abandoned the field, the proceedings to close up its affairs should date from that time. The members were entitled to their distributive share of the moneys on hand from that time. If losses occurred prior to that time, the beneficiaries are entitled to precedence and payment of their policies in full from the fund. If members have died since, their representatives are entitled to the distributive shares of such members.”<sup>1</sup> As the obligation to pay assessments to a benefit society is not absolute, but rests only upon the will of the member, there generally being no personal promise to pay, when the organization becomes insolvent the collapse is complete. On general principles, all the rules applicable to insolvent corporations apply to benefit societies and regulate proceedings against them.<sup>2</sup>

**§ 480. On Dissolution of Mutual Insurance Company Surplus Assets after Creditors are Paid Vests in State.** — When a dissolution of a mutual insurance company has been decreed by a court of competent jurisdiction, its assets remaining after paying all liabilities against the company vest in the State, as such corporation has no stockholders, and its original corporators cannot be regarded as such.<sup>3</sup> It is questionable whether this is right on principle; it is certainly reasonable to say that the persons contributing the funds, or who at the time of dissolution were policy holders, and therefore stockholders, are entitled to the surplus remaining after debts are paid.<sup>4</sup>

<sup>1</sup> The court cite as to jurisdiction *Cramer v. Bird*, L. R. 6 Eq. 143; *In re Suburban Hotel Co.*, L. R. 2 Ch. App. 737; *Marr v. Bank of West Tennessee*, 4 Coldw. 484; *Bradt v. Benedict*, 17 N. Y. 93; *Slee v. Bloom*, 19 Johns. 456. See also *Vanatta v. N. Y. Mut. L. Ins. Co.*, 31 N. J. Eq. 15.

<sup>2</sup> *Ante*, §§ 57, 58, 59.

<sup>3</sup> *Titcomb v. Kennebunk M. F. Ins. Co. (Me.)*, 9 Atl. Rep. 732; 4 N. Eng. Rep. 411.

<sup>4</sup> *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371.



## MORTALITY TABLES.

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**TABLE A.**—Comparison of the Carlisle, 17 offices, American Experience and English Life, Tables in respect to number living and dying at certain ages from 1 to 100.

**TABLE B.**—Comparison of Northampton, Carlisle, 17 offices, American Experience, English Life, and 30 American offices Tables, showing Expectancy of life by each at ages from 1 to 100.

**NOTE.**—For statement of origin, etc., of these various Tables, see note to § 22, *ante*.

### EXPLANATION OF SIGNS IN TABLE A.

- x.*** denotes the ages to which the statistics given in the same line apply.
- l*<sup>*x*</sup>.** denotes the number of persons living at the ages respectively given on the same line in the left hand column marked ***x.***
- d*<sup>*x*</sup>.** denotes the number of deaths at the ages given respectively on the same line in the left hand corner marked ***x.***

TABLE A. — COMPARISON OF DIFFERENT LIFE TABLES.

AGE. <i>x</i> .	Carlisle.		17 Offices. <i>l<sub>x</sub></i> .	Am. 1858. <i>l<sub>x</sub></i> .	English Life Table No. 3.			
	<i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .			Males, <i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .	Fem. <i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .
0	10,000	1,539			511,745	83,719	488,255	65,774
1	8,461	682			428,026	27,521	422,481	26,159
2	7,779	505			400,505	14,215	396,322	14,023
3	7,274	276			386,290	9,213	382,299	9,243
4	6,998	201			377,077	6,719	373,056	6,596
5	6,797	121			370,358	5,033	366,460	4,866
6	6,676	82			365,325	3,953	361,594	3,815
7	6,594	58			361,372	3,310	357,779	3,249
8	6,536	43			358,062	2,734	354,530	2,724
9	6,493	33			355,328	2,297	351,806	2,328
10	6,460	29	100,000	100,000	353,031	1,983	349,478	2,045
11	6,431	31	99,324	99,251	351,048	1,776	347,433	1,861
12	6,400	32	98,650	98,505	349,272	1,666	345,572	1,765
13	6,368	33	97,978	97,762	347,606	1,637	343,807	1,745
14	6,335	35	97,307	97,022	345,969	1,679	342,062	1,789
15	6,300	39	96,636	96,285	344,290	1,781	340,273	1,888
16	6,261	42	95,965	95,550	342,509	1,928	338,385	2,029
17	6,219	43	95,293	94,818	340,581	2,112	336,356	2,205
18	6,176	43	94,620	94,089	338,469	2,320	334,151	2,400
19	6,133	43	93,945	93,362	336,149	2,541	331,751	2,609
20	6,090	43	93,268	92,637	333,608	2,764	329,142	2,819
21	6,047	42	92,588	91,914	330,844	2,801	326,323	2,867
22	6,005	42	91,905	91,192	328,043	2,836	323,456	2,912
23	5,963	42	91,219	90,471	325,207	2,868	320,544	2,952
24	5,921	42	90,529	89,751	322,339	2,897	317,592	2,989
25	5,879	43	89,835	89,032	319,442	2,926	314,603	3,024
26	5,836	43	89,137	88,314	316,516	2,954	311,579	3,055
27	5,793	45	88,434	87,596	313,562	2,981	308,524	3,084
28	5,748	50	87,726	86,878	310,581	3,009	305,440	3,112
29	5,698	56	87,012	86,160	307,572	3,038	302,328	3,138
30	5,642	57	86,292	85,441	304,534	3,068	299,190	3,163
31	5,585	57	85,565	84,721	301,466	3,100	296,027	3,187
32	5,528	56	84,831	84,000	298,366	3,134	292,840	3,209
33	5,472	55	84,089	83,277	295,232	3,171	289,631	3,233
34	5,417	55	83,339	82,551	292,061	3,211	286,398	3,255
35	5,362	55	82,581	81,822	288,850	3,254	283,143	3,279
36	5,307	56	81,814	81,090	285,596	3,300	279,864	3,301
37	5,251	57	81,038	80,353	282,296	3,352	276,563	3,326
38	5,194	58	80,253	79,611	278,944	3,406	273,237	3,350
39	5,136	61	79,458	78,862	275,538	3,465	269,887	3,376
40	5,075	66	78,653	78,106	272,073	3,529	266,511	3,402
41	5,009	69	77,838	77,341	268,544	3,596	263,109	3,431
42	4,940	71	77,012	76,567	264,948	3,668	259,678	3,459
43	4,869	71	76,173	75,782	261,280	3,746	256,219	3,490
44	4,798	71	75,316	74,985	257,534	3,826	252,729	3,522
45	4,727	70	74,435	74,173	253,708	3,912	249,207	3,555
46	4,657	69	73,526	73,345	249,796	4,001	245,652	3,591
47	4,588	67	72,582	72,497	245,795	4,095	242,061	3,627
48	4,521	63	71,601	71,627	241,700	4,192	238,434	3,665
49	4,458	61	70,580	70,731	237,508	4,292	234,769	3,705



TABLE A.—COMPARISON OF DIFFERENT LIFE TABLES.—*Cont'd.*

AGE.	Carlisle.		17 Offices.		English Life Table No. 3.			
	<i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .	<i>l<sub>x</sub></i> .	<i>l<sub>x</sub></i> .	Males, <i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .	Fem. <i>l<sub>x</sub></i> .	<i>d<sub>x</sub></i> .
50	4,397	59	69,517	69,804	233,216	4,395	231,064	3,746
51	4,338	62	68,409	68,842	228,821	4,626	227,318	3,788
52	4,276	65	67,253	67,841	224,195	4,758	223,530	3,832
53	4,211	68	66,046	66,797	219,437	4,885	219,698	3,876
54	4,143	70	64,785	65,706	214,552	5,013	215,822	4,246
55	4,073	73	63,469	64,563	209,539	5,144	211,576	4,439
56	4,000	76	62,094	63,364	204,395	5,281	207,137	4,628
57	3,924	82	60,658	62,104	199,114	5,428	202,509	4,817
58	3,842	93	59,161	60,779	193,686	5,584	197,692	5,009
59	3,749	106	57,600	59,385	188,102	5,752	192,683	5,206
60	3,643	122	55,973	57,917	182,350	5,929	187,477	5,409
61	3,521	126	54,275	56,371	176,421	6,118	182,068	5,619
62	3,395	127	52,505	54,743	170,303	6,314	176,449	5,835
63	3,268	125	50,661	53,030	163,989	6,515	170,614	6,057
64	3,143	125	48,744	51,230	157,474	6,720	164,557	6,282
65	3,018	124	46,754	49,341	150,754	6,921	158,275	6,509
66	2,894	123	44,693	47,361	143,833	7,115	151,766	6,731
67	2,771	123	42,565	45,291	136,718	7,297	145,035	6,947
68	2,648	123	40,374	43,133	129,421	7,458	138,088	7,149
69	2,525	124	38,128	40,890	121,963	7,593	130,939	7,332
70	2,401	124	35,837	38,569	114,370	7,695	123,607	7,489
71	2,277	134	33,510	36,178	106,675	7,756	116,118	7,613
72	2,143	146	31,159	33,730	98,919	7,770	108,505	7,698
73	1,997	156	28,797	31,243	91,149	7,733	100,807	7,736
74	1,841	166	26,439	28,738	83,416	7,639	93,071	7,724
75	1,675	160	24,100	26,237	75,777	7,483	85,347	7,653
76	1,515	156	21,797	23,761	68,294	7,268	77,694	7,521
77	1,359	146	19,548	21,330	61,026	6,990	70,173	7,329
78	1,213	132	17,369	18,961	54,036	6,655	62,844	7,071
79	1,081	128	15,277	16,670	47,881	6,266	55,773	6,755
80	953	116	13,290	14,474	41,115	5,832	49,018	6,382
81	837	112	11,424	12,383	35,283	5,361	42,636	5,959
82	725	102	9,694	10,419	29,922	4,862	36,677	5,496
83	623	94	8,112	8,608	25,060	4,349	31,181	5,003
84	529	84	6,685	6,955	20,711	3,834	26,178	4,490
85	445	78	5,417	5,485	16,877	3,328	21,688	3,972
86	367	71	4,306	4,193	13,549	2,840	17,716	3,458
87	296	64	3,348	3,079	10,709	2,384	14,258	2,962
88	232	51	2,537	2,146	8,325	1,965	11,296	2,494
89	181	39	1,864	1,402	6,360	1,590	8,802	2,063
90	142	37	1,319	847	4,770	1,260	6,739	1,673
91	105	30	892	462	3,510	979	5,066	1,331
92	75	21	570	216	2,531	744	3,735	1,037
93	54	14	339	79	1,787	553	2,698	790
94	40	10	184	21	1,234	401	1,908	588
95	30	7	89	8	833	285	1,320	428
96	23	5	37		548	196	892	304
97	18	4	13		352	132	588	210
98	14	3	4		220	86	378	142
99	11	2	1		134	55	236	92
100	9	2			79	33	144	59

Beyond 100 years: Carlisle, *l<sub>x</sub>* 7, 5, 3, 1. English, No. 3, Males, *l<sub>x</sub>* 46, 25, 14, 7, 4, 2, 1.  
 " " Females, *l<sub>x</sub>* 85, 49, 27, 15, 8, 4, 2, 1.

TABLE B.—EXPECTATION OF LIFE BY VARIOUS TABLES—YEARS AND DECIMALS.

AGE. x.	North- ampton.	Carlisle.	17 Offices.	Am. 1858.	English Life, No. 3.		30 Am. Offices.	
					Males.	Females.	Males.	Females.
0	25.18	38.72			39.91	41.85		
1	32.74	44.68			46.65	47.31		
2	37.79	47.55			48.83	49.40		
3	39.55	49.82			49.61	50.20		
4	40.58	50.76			49.81	50.43		
5	40.84	51.25			49.71	50.33		
6	41.07	51.17			49.39	50.00		
7	41.03	50.80			48.92	49.53		
8	40.79	50.24			48.37	48.98		
9	40.36	49.57			47.74	48.35		
10	39.78	48.82	48.36	48.72	47.05	47.67	49.99	48.05
11	39.14	48.04	47.68	48.08	46.31	46.95	49.32	47.21
12	38.49	47.27	47.01	47.45	45.54	46.20	48.64	46.40
13	37.83	46.51	46.33	46.80	44.76	45.44	47.95	45.64
14	37.17	45.75	45.64	46.16	43.97	44.66	47.26	44.91
15	36.51	45.00	44.96	45.50	43.18	43.90	46.57	44.19
16	35.85	44.27	44.27	44.85	42.40	43.14	45.88	43.48
17	35.20	43.57	43.58	44.19	41.64	42.40	45.18	42.79
18	34.58	42.87	42.88	43.53	40.90	41.67	44.48	42.12
19	33.99	42.17	42.19	42.87	40.17	40.97	43.78	41.46
20	33.43	41.46	41.49	42.20	39.48	40.29	43.07	40.82
21	32.90	40.75	40.79	41.53	38.80	39.63	42.36	40.19
22	32.39	40.04	40.09	40.85	38.13	38.98	41.65	39.56
23	31.88	39.31	39.39	40.17	37.46	38.33	40.93	38.96
24	31.36	38.59	38.68	39.49	36.79	37.68	40.21	38.38
25	30.85	37.86	37.98	38.81	36.12	37.04	39.49	37.80
26	30.33	37.14	37.27	38.12	35.44	36.39	38.77	37.23
27	29.82	36.41	36.56	37.43	34.77	35.75	38.04	36.66
28	29.30	35.69	35.86	36.73	34.10	35.10	37.31	36.08
29	28.79	35.00	35.15	36.03	33.43	34.46	36.58	35.49
30	28.27	34.34	34.43	35.33	32.76	33.81	35.85	34.89
31	27.76	33.68	33.72	34.63	32.09	33.17	35.12	34.29
32	27.24	33.03	33.01	33.92	31.42	32.53	34.38	33.69
33	26.72	32.36	32.30	33.21	30.74	31.88	33.65	33.06
34	26.20	31.68	31.58	32.50	30.07	31.23	32.91	32.42
35	25.68	31.00	30.87	31.78	29.40	30.59	32.17	31.78
36	25.16	30.32	30.15	31.07	28.73	29.94	31.43	31.13
37	24.64	29.64	29.44	30.35	28.06	29.29	30.70	30.47
38	24.12	28.96	28.72	29.62	27.39	28.64	29.96	29.81
39	23.60	28.28	28.00	28.90	26.72	27.99	29.22	29.16
40	23.08	27.61	27.28	28.18	26.06	27.34	28.48	28.48
41	22.56	26.97	26.56	27.45	25.39	26.69	27.75	27.82
42	22.04	26.34	25.84	26.72	24.73	26.03	27.01	27.15
43	21.54	25.71	25.12	26.00	24.07	25.38	26.28	26.45
44	21.03	25.09	24.40	25.27	23.41	24.72	25.55	25.74
45	20.52	24.46	23.69	24.54	22.76	24.06	24.82	25.02
46	20.02	23.82	22.97	23.81	22.11	23.40	24.09	24.30
47	19.51	23.17	22.27	23.08	21.46	22.74	23.38	23.57
48	19.00	22.50	21.56	22.36	20.82	22.08	22.66	22.83
49	18.49	21.81	20.87	21.63	20.17	21.42	21.95	22.08

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AGE. x.	North- ampton.	Carlisle.	17 Offices.	Am. 1858.	English Life, No. 3.		30 Am. Offices.	
					Males.	Females.	Males.	Females.
50	17.99	21.11	20.18	20.91	19.54	20.75	21.24	21.33
51	17.50	20.39	19.50	20.20	18.90	20.09	20.54	20.59
52	17.02	19.68	18.82	19.49	18.28	19.42	19.84	19.87
53	16.54	18.97	18.16	18.79	17.67	18.75	19.15	19.15
54	16.06	18.28	17.50	18.09	17.06	18.08	18.47	18.44
55	15.58	17.58	16.86	17.40	16.45	17.43	17.80	17.73
56	15.10	16.89	16.22	16.72	15.86	16.79	17.13	17.03
57	14.63	16.21	15.59	16.05	15.26	16.17	16.47	16.35
58	14.15	15.55	14.97	15.39	14.68	15.55	15.83	15.67
59	13.68	14.92	14.37	14.74	14.10	14.94	15.19	15.02
60	13.21	14.34	13.77	14.10	13.53	14.34	14.56	14.37
61	12.75	13.82	13.18	13.47	12.96	13.75	13.94	13.73
62	12.28	13.31	12.61	12.86	12.41	13.17	13.34	13.10
63	11.81	12.81	12.05	12.26	11.87	12.60	12.74	12.49
64	11.35	12.30	11.51	11.67	11.34	12.05	12.16	11.90
65	10.88	11.79	10.97	11.10	10.82	11.51	11.60	11.31
66	10.42	11.27	10.46	10.54	10.32	10.98	11.04	10.74
67	9.96	10.75	9.96	10.00	9.83	10.47	10.50	10.19
68	9.50	10.23	9.47	9.47	9.36	9.97	9.97	9.65
69	9.05	9.70	9.00	8.97	8.90	9.48	9.46	9.13
70	8.60	9.18	8.54	8.48	8.45	9.02	8.97	8.62
71	8.17	8.65	8.10	8.00	8.03	8.57	8.49	8.13
72	7.74	8.16	7.67	7.55	7.62	8.13	8.02	7.65
73	7.33	7.72	7.26	7.11	7.22	7.71	7.57	7.20
74	6.92	7.33	6.86	6.68	6.85	7.31	7.14	6.76
75	6.54	7.01	6.48	6.27	6.49	6.93	6.72	6.34
76	6.18	6.69	6.11	5.88	6.15	6.56	6.32	5.93
77	5.83	6.40	5.76	5.49	5.82	6.21	5.93	5.55
78	5.48	6.12	5.42	5.11	5.51	5.88	5.57	5.18
79	5.11	5.80	5.09	4.74	5.21	5.56	5.21	4.82
80	4.75	5.51	4.78	4.39	4.93	5.26	4.87	4.49
81	4.41	5.21	4.48	4.05	4.66	4.98	4.55	4.17
82	4.09	4.93	4.18	3.71	4.41	4.71	4.24	3.88
83	3.80	4.65	3.90	3.39	4.17	4.45	3.95	3.59
84	3.58	4.39	3.63	3.08	3.95	4.21	3.67	3.33
85	3.37	4.12	3.36	2.77	3.73	3.98	3.40	3.08
86	3.19	3.90	3.10	2.47	3.53	3.76	3.14	2.84
87	3.01	3.71	2.84	2.18	3.34	3.56	2.89	2.62
88	2.86	3.59	2.59	1.91	3.16	3.36	2.64	2.42
89	2.66	3.47	2.35	1.66	3.00	3.18	2.39	2.23
90	2.41	3.28	2.11	1.42	2.84	3.01	2.17	2.05
91	2.09	3.26	1.89	1.19	2.69	2.85	1.98	1.89
92	1.75	3.37	1.67	.98	2.55	2.70	1.81	1.73
93	1.37	3.48	1.47	.80	2.41	2.55	1.64	1.59
94	1.05	3.53	1.28	.64	2.29	2.42	1.49	1.46
95	.75	3.53	1.12	.50	2.17	2.29	1.34	1.34
96	.50	3.46	.99		2.06	2.17	1.18	1.23
97		3.28	.89		1.95	2.06	1.03	1.09
98		3.07	.75		1.85	1.96	.83	.93
99		2.77	.50		1.76	1.86	.50	.50
100		2.28			1.68	1.76		



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